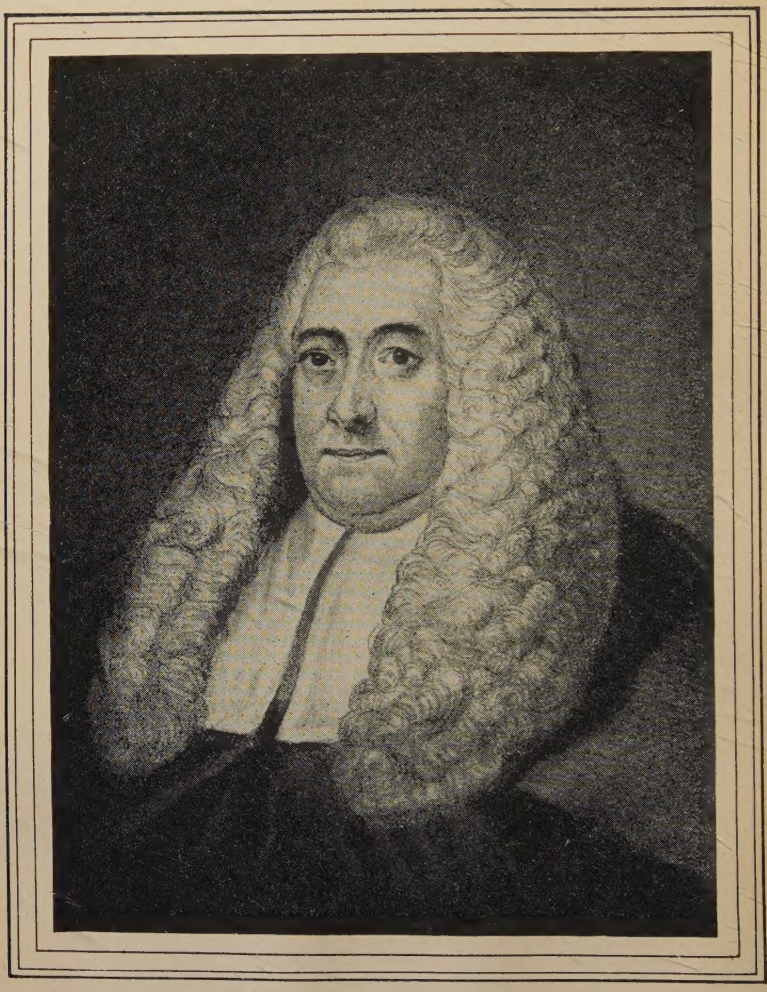
ELEMENTS OF BUSINESS LAW

HUFFCUT - BOGERT



SIR WILLIAM BLACKSTONE (1723–1780)

An English barrister, judge, lecturer at Oxford, and author of "Commentaries on the Laws of England." His "Commentaries" are a clear, accurate exposition of the law in his day and have had great influence, especially as subjects of study for law students

THE ELEMENTS OF BUSINESS LAW

WITH ILLUSTRATIVE EXAMPLES AND PROBLEMS

BY

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REVISED BY

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SECOND REVISED EDITION

GINN AND COMPANY

BOSTON · NEW YORK · CHICAGO · LONDON
ATLANTA · DALLAS · COLUMBUS · SAN FRANCISCO

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PRINTED IN THE UNITED STATES OF AMERICA

526.7

The Athenæum Press
GINN AND COMPANY · PROPRIETORS · BOSTON · U.S.A.

PREFACE TO SECOND REVISED EDITION

In this edition technical, legal words have, so far as possible, been replaced by simpler terminology; condensed, elliptical expressions have been expanded; abstract statements have in many cases been changed to the concrete or lightened by illustration; and the names of actual parties have been substituted for letters in the problems and examples. The object has been to make the book more interesting, easier to study, and better adapted to use by students who have had no previous legal training.

The discussion of certain rather difficult questions of slight practical value has been omitted. As examples of this change may be mentioned the removal of the material on the distinctions between express and implied warranties and conditions in the sales contract at common law, the abandonment of the civil law, Latin names for the various kinds of bailments, and the exclusion of the explanations of tenements, hereditaments, and the fee tail in the law of real property.

The wide adoption of the Uniform Sales Act and the almost general adoption of the Uniform Negotiable Instruments Act have caused the reviser to increase the emphasis on the rules of those statutes and to abandon any extended discussion of the common-law doctrines which have been supplanted by those acts. For similar reasons, in the chapter on Master and Servant increased stress has been placed on the modern statutes regarding employers' liability and workmen's compensation and less emphasis on the common-law rules. The sections on bankruptcy have likewise been considerably expanded.

New forms have been substituted for the old in most cases. Several instruments have been included, no copy of which appeared in the former editions; for example, the conditional sale contract, the trust receipt, the warehouse receipt, the trade acceptance, and the chattel mortgage.

In the selection of forms and in the problems and examples care has been taken to make a distribution among the various states and to avoid illustrating the law of a particular state or section.

Recent changes in business custom and current state and Federal decisions and statutes have been examined, and the results included in this edition. A large number of new subjects have been treated, and in some instances the discussions of old topics have been amplified. As examples may be named the paragraphs on the courts, the order of precedence among statutes and decisions, the increase in boards and commissions, attachment and garnishment, the declaratory judgment, the parol-evidence rule, the termination of contracts of employment, arbitration, conditional sales, trust receipts, consignments of goods for sale, the sale-in-bulk statutes, equipment trusts, the negotiability of warehouse receipts and bills of lading, Federal regulation of railroads, state regulation of public-utility companies, the power of national banks to act as fiduciaries, the Federal farm-loan system and the joint-stock land banks, small loans, the marketing of securities (including underwriting and syndicates), the trade acceptance, the factors' acts, the business trust, the selection of a corporate name and of a state for incorporation, the blue-sky laws, voting trusts, stock dividends, the different kinds of stock, including stock with no par value, the Federal laws regarding monopolies and restraint of trade, the zoning systems, public rights of navigation, the trust deed, patents, and copyrights.

It is hoped that the result of this revision is a book which is in harmony with present law and business practice and is simpler, clearer, and more interesting than the previous editions.

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Ithaca, New York

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THE ELEMENTS OF BUSINESS LAW

CHAPTER I

PRELIMINARY TOPICS

Business Law and Related Subjects

1. Business. Business is concerned with property, credit, and services, and with contracts pertaining to these things.

The term "business" embraces every kind of industrial activity by which men acquire, manufacture, or otherwise produce property; by which they sell or transfer it; by which they store, transport, or insure it; by which they borrow or lend money and give or secure credit; by which they combine with others to these ends; and by which they furnish or obtain services in these and similar enterprises. This is by no means an exhaustive list of commercial operations, but it indicates the variety and extent of those human activities that pass under the name of business.

2. Law. The term "law" includes all those rules by which courts are controlled in the administration of justice. The same rules must also govern men in their relations to each other, because if the rules be violated, the courts will either give relief to the injured party or refuse to aid the one who has violated them.

Rules of law are of two kinds: first, those that have been worked out by the courts themselves in deciding actual cases brought before them; second, those enacted by the legislatures. The first are known as the common law; the second, as statute law. The common law is sometimes called the unwritten law; statute law is sometimes called the written law.

1. *Common law.* The common law is therefore the law declared by judges in the decision of cases. It rests primarily upon custom, because in deciding cases the judges seek to give effect to the prevailing customs of the people in their relations and dealings with each other. But when a point of law is once decided, other judges in the same jurisdiction follow it as a precedent, and the point is said to be decisively settled. This is known as the doctrine of *stare decisis*,—the doctrine that courts must stand by earlier cases, uphold precedents, and decide a question, whenever it may arise, just as it was first decided by their court. With the passage of time, therefore, the greater number of the ordinary questions that may arise have been thus settled and the common law established. The rules must be sought in the printed reports of the decisions of the courts.

2. *Statute law.* Statute law consists of the acts passed by legislatures. These may be for the purpose of changing some rule established by the courts when, for example, the development of society makes the continuance of the old rule undesirable, or for the purpose of collecting into a brief statute the rules scattered through hundreds or even thousands of volumes of reported cases. The whole law of negotiable instruments has been thus codified in England and in nearly all our American states (see section 97 *post*).

The principal sources of information as to the law of any state are therefore the statute books and the reports of its courts. The reports are numbered consecutively in order of time. A reference to Akin v. Kellogg, 119 N.Y. 441, means that in volume 119 of the New York reports, at page 441, is printed in full the court's opinion and decision in a case in which Akin was plaintiff and Kellogg was defendant. These reports may be found in lawyer's offices or law libraries.

A statute or decision is not binding except in the state where enacted or rendered. An act of the legislature of California does not control the residents of Ohio, except as they may be in California or have business or property there. A decision by the Supreme Court of Illinois does not oblige the Supreme Court of Indiana to decide the same question in the same way.

The United States and each of the states has a written constitution framed by representatives of the people. These constitutions state the powers and duties of the various officers of government

and define the fundamental rights of the citizens; as, for example, the right to freedom of speech and a jury trial. The Constitution of the United States gives that government exclusive control of certain affairs, as, for example, the coinage of money, and interstate commerce. The states have all powers not thus delegated to the national government, as, for example, the power to punish crime and regulate commerce within the state.

The order of precedence in laws is, therefore, first, the Constitution of the United States, treaties with foreign nations made under this Constitution, and laws enacted by the Federal Congress concerning subjects of which the national government has jurisdiction; secondly, the constitutions of the states and the laws made by the state legislatures regarding the matters left to the control of the states.

Examples. 1. A Federal statute requires trains engaged in interstate commerce to be fitted with certain safety appliances. This law is absolutely controlling because the Federal Constitution gives Congress control of interstate commerce. A state law to the contrary would be of no effect.

2. A state statute requires local street cars to be fitted with special brakes to prevent runaways. This is a local matter exclusively within the control of the state, and a national law on the subject would be void.

Boards of Supervisors or other bodies acting as county legislatures pass resolutions which are binding on citizens of the county and are law. So, too, the Boards of Aldermen for the various cities enact ordinances which govern local matters and have the effect of law. The supervisors may direct the paving of a certain highway. The aldermen may prohibit jitneys on the main streets of the city.

3. Business law. Business law is that portion of the general law which governs business transactions. While the term is frequently used as if it indicated a distinct body of law capable of accurate definition, it is in reality a term of vague meaning. One engaged in business transactions may be confronted with legal questions involving almost any topic of the law, and hence might need advice from an expert or might in simple cases be able to solve the difficulty for himself. The most that any law book for

business men or students of commercial law can well undertake to do is to present the elementary principles governing the ordinary business transactions, leaving for lawyers the more intricate or technical problems. The chief aim of such a book should be to inform the business man how to keep out of difficulties, rather than to enable him to free himself after he is once involved.

Business law is, therefore, merely such a selection from the whole field of the law, and especially the law of contract, as a particular author may think it profitable for a business man to know.

4. Divisions of the law. The law may be divided into two great branches, public law and private law.

1. *Public law.* Public law includes those topics with which the state, that is, the public as a whole, is especially concerned: namely, (1) international law, or the law governing the relations of one nation to other nations; (2) constitutional law, or the fundamental law governing a nation or state in its relations to its citizens; (3) criminal law, or the law by which the public protects itself against crimes and offenses prejudicial to its well-being; and (4) administrative law, or the law under which governmental affairs are carried on, as tax laws, highway laws, and the like.

2. *Private law.* Private law includes those topics with which individuals are particularly concerned in their private relations. These are very numerous but may be roughly grouped under three main heads: namely, (1) the law of property, including acquisition, ownership, possession, protection, transfer, descent, and the like; (2) the law of obligation, including contracts, torts, trusts, and the like; and (3) the law of procedure, or the law by which cases are brought into courts and conducted to trial and judgment.

The topics treated under the head of business law are those involving either the law of property or the law of obligation. The acquisition and transfer of property, the making and performing of contracts, constitute the larger part of a business enterprise.

5. Property. Property consists of the rights of the owner in any of the numerous objects and articles which can be possessed and enjoyed.

Examples. 1. Bronson has the right to use the house 120 Main St. in any lawful way he likes forever. This right is Bronson's property in the house. It is called real property, because concerned with land.

2. Davis has raised 1000 bushels of corn on his farm. His right to use or sell the grain as he wishes is his property in the corn. It is personal property.

A detailed description of the different kinds of property and their incidents is given later (sect. 175 *post*). Business law is very frequently concerned with these rights of ownership or property rights in land, goods, stocks and bonds, etc.

6. Legal obligations. Legal obligations are those which the courts enforce. They arise either by agreement between men or because the law creates the obligations, without any agreement between the parties.

1. *Contracts.* An agreement between two or more persons enforceable in the courts we call a contract, and the failure or refusal to carry out the agreement we call a breach of contract.

Example 1. Dever agrees with Black that Dever shall sell and Black shall buy Dever's bicycle for $30. This is a contract. If Dever refuses to carry out his part of it, Dever has been guilty of a breach of contract and Black has a case at law for damages.

Contracts have to do with a great variety of dealings, and many special kinds of contracts may be named, such as contracts of sale, contracts of bailment, contracts of carriage, contracts of insurance, contracts of partnership, contracts of guaranty, contracts for the loan of money, and the like.

2. *Torts.* The obligations fixed by private law without any agreement of the parties have no names, but the breach of any of these obligations is called a tort, which is simply the French word for "wrong." Many of these torts have names.

Examples. 2. Walker strikes Taylor in anger. Walker has committed the tort called assault and battery.

3. Darby goes without permission on Welman's land. Darby has committed the tort called trespass.

4. Barrett calls Morris a thief. Barrett has committed the tort called slander. If Barrett writes the words, the tort is called libel.

In each of the above cases the wrongdoer was under an obligation placed upon him by the law not to infringe upon the personal security or property rights of another to his damage, and to use due care for the safety of others and their property. The violation of this obligation constitutes the tort. The wrongdoer was not under the obligation because he had agreed not to injure another.

Where, in the formation of a contract, one party knowingly makes a false representation to the other, a tort is committed. Where, after a contract is made, one who has not entered into the contract induces one of the parties to break it, a tort is also committed.

Examples. 5. Vesey wishes to sell sheep to Peters. He tells Peters that they are sound and healthy. He knows they are diseased. Peters buys the sheep and afterward discovers that they are diseased. (1) There is a contract between Vesey and Peters. (2) There is a tort, known as deceit, committed by Vesey.

6. Gary agrees to work for Bingham. Fletcher, knowing this, induces Gary to break the contract. Fletcher has committed a tort which has no very specific name. It is called "inducing breach of contract," or, in this form of contract, "enticing away a servant."

3. *Quasi-contracts.* In certain cases where there is no true contract, the law, by reason of some act or situation of a party, imposes an obligation upon him and gives a remedy against him, as if, in fact, his obligation did arise from his promise. In order to prevent unjust enrichment and to give an efficient remedy, the law indulges in such cases the fiction that a promise was made, and permits an action in the form of an action on contract. These cases are called quasi-contracts, because the form of remedy is like that in the case of a true contract.

Examples. 7. Gavin steals Harvey's money. Harvey may recover the money in a contract action, there being by fiction of law an implied promise on the thief's part to repay it.

8. McNutt by mistake pays Masters more than he owes. McNutt may recover the excess in a contract action. The law implies a promise by Masters to return the overpayment.

9. Hopkins is a lunatic, known to be one, and incapable of making a contract. Coleman furnishes Hopkins with necessary food. Coleman may

recover the reasonable value of the food in a contract action. The law creates the promise of the lunatic to pay for necessaries.

4. *Trusts.* A trust is an obligation of one who has the title to property to manage and account for it to another. Trusts are not recognized or enforced by the courts known as the law courts, but by the courts known as the equity or chancery courts. These courts are explained in the next section.

Example 10. Jones conveys or wills his farm in trust to Hammond to receive the rents and income and pay the same over to Ross. This is a trust. Ross's rights are not recognized by the law courts, but the equity courts recognize and enforce Ross's rights and compel Hammond to account to Ross for the rents and income.

The so-called trusts referred to in popular discussions are not now trusts in the above technical sense, but are simply monopolies or combinations. Originally stockholders in various corporations placed their shares of stock in trust with a committee, and the total profits of all the corporations were divided among the various stockholders, thus constituting a real technical trust; but it is now the custom to unite all the corporations into one corporation, in order to eliminate competition. This does not create a true trust, but the old name continues to be used to describe the new monopolistic device.

7. Courts. The courts of a particular state consist of law courts and equity courts, although in modern times these are generally combined. The United States has also a court with admiralty jurisdiction.

1. *Law courts.* Law courts are organized tribunals for the trial of cases and the hearing of appeals. Each state has trial courts and at least one court to which appeals may be taken. Trial courts consist of a judge or a judge and a jury, with attendant officers. Appellate courts consist of several judges without a jury.

The trial courts generally are

a. A court having the power to try any case arising anywhere in the state, no matter how large the amount involved. The judges of this court hold court at the various county seats throughout the state. This court is called by various names in the different states, as, for example, the circuit, district, or superior court.[1]

[1] In Ohio and South Carolina this court is called the Court of Common Pleas; and in New York the Supreme Court.

b. Courts having the power to try only cases arising in a certain locality or involving a limited amount of money, as, for example, county, district, municipal, city, or justice of the peace courts.

c. The courts for the administration of the estates of deceased persons are called probate, surrogates', or orphans' courts.

The appellate courts are

a. Intermediate appellate courts, which hear appeals from the trial courts, and from which appeals may be taken in some instances to the highest appellate courts. These intermediate courts exist in a few states only.[1]

b. The final court of appeal, which exists in all states, and in most states is the only important appellate court. This is usually called the supreme court.[2]

Of the Federal courts the trial court is the District Court; the intermediate appellate court is the Circuit Court of Appeals, and the highest appellate court is the Supreme Court.

2. *Equity courts.* Side by side with the common-law courts there grew up in England a separate court known as the equity court or the chancery court. This court consisted of a judge without a jury, and was intended to give relief in hard cases where, by the somewhat rigid rules of the common-law courts, none could be had. A body of rules or doctrines evolved by this court is known as equity. Equity consists, therefore, of the rules and doctrines by which equity courts are controlled in the administration of justice.

In a few of our states[3] such separate equity courts still exist, but generally the powers of a common-law court and of an equity court have been combined in one court which administers both law and equity. In such case the court of general jurisdiction is both a common-law and an equity court. If one wished to sue for breach of contract or for an accounting for a trust, he would go before the same court: in the contract case the judge with a jury

[1] In Alabama, California, Georgia, Illinois, Indiana, Missouri, New York, Ohio, Tennessee, and Texas.

[2] But in Connecticut it is called the Supreme Court of Errors; in Kentucky, Maryland, and New York, the Court of Appeals; in Maine and Massachusetts, the Supreme Judicial Court; in New Jersey, the Court of Errors and Appeals; and in Virginia and West Virginia, the Supreme Court of Appeals.

[3] Alabama, Delaware, Mississippi, New Jersey, Tennessee, and Vermont.

would administer law rules; in the trust case the judge without a jury would administer equity rules.

3. *Admiralty courts.* Admiralty courts administer still a different law, known as the admiralty law or law of the sea. They have to do with vessels and their cargoes and crews upon public navigable waters. There is no separate court of admiralty in the United States; the District Courts of the United States have admiralty jurisdiction and administer admiralty law. State courts have no admiralty jurisdiction. An admiralty court consists of a judge without a jury. The judge is the trier of the facts as well as the administrator of the law.

4. *Boards and commissions.* In recent years there have been created in states and nation numerous boards and commissions which make decisions and establish rules which govern business men. Among these may be mentioned the Interstate Commerce Commission at Washington, which regulates the freight and passenger rates of interstate railroads; the state public-service, or railroad, or corporation commissions, which control the charges and service of such public-service corporations as gas, electricity, water, telephone, and street-railway companies; and the state workmen's compensation or industrial commissions, which administer the laws regarding payments to workmen who are injured in the course of their employment. These commissions are not courts, but they administer the law and sometimes make rules which are in effect laws.

8. Procedure. A case is brought before a court by pleadings. The plaintiff makes a complaint or declaration, setting out the facts which he claims constitute his cause of action, and a summons to appear and answer this is served upon the defendant. The latter makes an answer to the complaint. Upon these documents, or others which may be allowed, the issue is framed; that is, the question in dispute is made clear.

At a time appointed the parties go before the court with their attorneys and witnesses and give evidence to sustain their contentions. The jury is instructed by the judge as to the law of the case, and renders its verdict upon the facts proved and the instructions received. The court enters a judgment in accordance with this verdict.

The defeated party may appeal from this judgment. His attorney prepares a transcript of the evidence, and with this, upon notice to his opponent, goes before an appellate court of judges and asks to have the judgment reversed. Argument by both parties is heard by the appellate court. If the court finds a substantial error in the rulings or instructions of the trial judge, or finds the verdict unsupported by the evidence, it may reverse the judgment and order a new trial. Otherwise it affirms the judgment.

If a new trial is ordered, the same procedure as on the first trial is repeated, except that no new pleadings are necessary.

When a final judgment is entered, the successful party is entitled, besides any judgment for a fixed sum, to such costs as may be allowed by law. If the judgment is not paid, the successful party may issue an execution against the property of his adversary, and the sheriff may levy on (that is, seize) the property and sell it to satisfy the judgment. In every state a small amount of property is exempt from levy and sale upon judgments. These exemption laws are intended to secure to debtors certain household necessities, tools of a trade, and often a homestead.

Attachment is the process by which a party to an action has some property of his opponent seized and held in the custody of the law pending the outcome of the action. This is not allowed in all actions, but only in special cases, as where fraud or other wrongdoing is involved. Attaching the property of a defendant enables the plaintiff to prevent the defendant from removing or concealing his assets, and guarantees to the plaintiff that he will have some property available from which he can collect his judgment if he obtains it.

A party who has recovered a judgment may levy an execution against the wages of the defendant. This is called *garnishment*, or garnisheeing the wages. By court order the employer of the defendant is obliged to pay a certain percentage of the wages of the defendant to the plaintiff until the judgment is satisfied. In this way a judgment can be collected, even though the debtor has no land or goods. Wages below a certain small sum, as, for example, twelve dollars a week, are not subject to garnishment.

The *declaratory judgment* is a device which is being increasingly used. It is a judgment of a court stating or declaring what the rights of the parties are with respect to a certain contract, will, deed, or other paper or relationship. The parties ask the advice of the court as to their rights and duties, without waiting for one party or the other to commit a wrong and give rise to a lawsuit.

Example. Acker sold his business to Bromeier and agreed not to engage in any similar business within the state of Illinois for twenty years. Afterward Acker is told that this provision is unlawful. Bromeier argues that it is lawful and that he will insist on its being carried out. Instead of having Acker go into business and Bromeier bring an action for damages, the parties may bring an action for a declaratory judgment and ask the court to tell them whether the contract is a lawful contract or not.

9. Scope of this work. A business man has to deal mainly with property and contracts. He can hardly carry on business without dealing directly or indirectly with some kind of property, and very often the purchase and sale of property is the chief part of his business. He cannot carry on business at all without making contracts,—often scores or hundreds of contracts in a single day. Accordingly these two topics of the law are those with which the business man should be especially familiar. He needs to know what constitutes a binding contract, what obligations arise upon its completion, and what steps are necessary to its legal performance. While he can hardly hope to know technically about torts, he ought, if an employer of workmen, to know what obligations he undertakes as concerns their safety, and what liabilities he incurs by failing to use proper care to have his machinery in a safe condition. It will be the object of this work to state some of the more important legal rules connected with these subjects.

We shall first consider the formation of contracts, that is, what constitutes a binding and enforceable agreement. This will be followed by a discussion of the performance of contracts and the discharge of contracts, that is, how they are ended and the rights under them terminated.

These general principles will be followed by a discussion of the particular contracts concerning personal property (namely, the sale, bailment, carriage, and insurance of goods) and the particular

contracts concerning credit, that is, contracts creating debts, contracts of guaranty, and contracts contained in commercial paper.

Agency, the means by which one makes contracts through an employee, follows the discussion of contracts and their special forms. Here also is a discussion of the subject of master and servant.

Business associations, such as partnerships and corporations, are next discussed.

Finally, there is a concise treatment of the subject of property, real and personal, in order to bring together some topics not treated under the head of contract.

REVIEW QUESTIONS

1. With what is business concerned? What is included in the term "business"? Enumerate all the different kinds of business conducted on a specified block of a business street in your city or village.

2. Define law; common law; statute law. Who declares the common law? Where is it found? What is it based upon? What is the force of precedents? What are the two objects of statute law? Why is the law more difficult to state in America than in England? When do national laws control? When do state laws control?

3. Explain "business law." From what branch of the law is it mainly taken?

4. Name two main divisions of the law. What does public law include? What does private law include?

5. What is property? Name some property rights which belong to you.

6. What are legal obligations? How do they arise? Distinguish between contract obligation and tort obligation. Illustrate. Name and illustrate some torts. Explain and illustrate quasi-contracts. Explain and illustrate trusts. Explain the meaning of the term "trust" in economic discussions.

7. What is a court? a trial court? an appellate court? Describe three kinds of trial courts. Name the Federal courts. What are equity courts? Do they have a jury? What is equity? What are admiralty courts? What cases do they hear? What is the United States admiralty court? Name some boards and commissions in your state.

8. Describe the steps in bringing a case before a court and to trial and judgment. Explain the process of an appeal. How is a judgment enforced? What are exemptions? What is attachment? garnishment? a declaratory judgment?

PART I. THE PRINCIPLES OF CONTRACT

CHAPTER II

FORMATION OF CONTRACTS

10. Definition of contract. A contract is an agreement between two or more persons for the violation of which a court of law will give damages. There are many agreements for the breaking of which no damages can be had, either because the agreement contemplates no legal relations or because it ends in a legal relation that is enforceable only in a court of equity.

Examples. 1. Laird agrees to sell a watch to Lake for $25, and Lake agrees to pay Laird $25 for the watch. This is a contract. If Laird refuses to deliver the watch, Lake has an action at law against Laird for damages. If Lake refuses to take the watch and pay the $25, Laird has an action at law against Lake for damages.

2. Carter and Laidlaw mutually agree that they will meet each other at a certain place and go to a football game together. This is not a contract. It contemplates social, not legal, relations.

3. Stair agrees with Lombard to take Lombard's money and invest it, receive the income, pay the income to Lombard during his life, and divide the principal among Lombard's children after Lombard's death. This creates a trust. If Stair failed to pay over the income, Lombard's remedy would be by suit in equity for an accounting, not at law for damages. Since the agreement is not enforceable at law, it is not a contract.

The agreement may give one party the right to demand that the other do something (affirmative contract), or it may give one party the right to demand that the other forbear from doing something (negative contract), or the same agreement may give both rights.

Example 4. Reilly sells his dry-goods business to Lang for $5000, and agrees not to engage in that business again in the same city. Lang acquires

two rights: first, the right to have Reilly transfer to him the business; and, second, the right to have Reilly refrain from entering into competition with him. For the breach of either of these agreements Lang has an action at law for damages. (For the breach of the second he might also secure an injunction order in equity forbidding Reilly from starting a new store, because the damages he would suffer from Reilly's competition are so uncertain that the legal remedy is deemed inadequate; but since he may have damages at law, the agreement is a contract. Equity courts sometimes specifically enforce contracts, that is, order one of the parties to do exactly what he agreed to do under the contract.)

The persons making the agreement may be two or more, but they are so divided as to constitute two groups of persons.

Example 5. Farber sells his horse to John and Small. John and Small resell the horse to Drew, Colson, and Bingham. In the first contract Farber is on one side and John and Small jointly on the other. In the second contract John and Small are on one side and Drew, Colson, and Bingham on the other.

In some cases three parties make among them three contracts, which constitute what is called a novation.

Example 6. Morse owes Banks $100. Banks owes Kinney $100. The three meet and agree that Morse shall pay Kinney. Banks's claim on Morse is extinguished. Banks's obligation to Kinney is extinguished. A new obligation from Morse to Kinney is created. Thus there are, in effect, three contracts.

11. Essentials of enforceable contract. In order that a contract shall be enforceable, that is, one for the nonperformance of which the law will give damages, the following elements must be present: (1) an agreement, (2) by competent parties, (3) upon sufficient consideration, (4) in some cases evidenced in a particular form, (5) for a lawful object, and (6) made without mistake, fraud, undue influence, or duress.

I. Agreement

12. Contracts begin in agreement. All true contracts begin with an agreement. By agreement is meant the meeting of the minds of the contracting parties in a common assent to the same definite conclusion. But the state of the mind of a party must be judged

by what he says and does. He cannot definitely agree to a thing and afterward escape upon the plea that he misspoke himself or did an act showing agreement which he did not intend to do.

Examples. 1. Holland leads out a colt and says to Locke, "I will sell you this colt for $40." Locke answers, "I will take him at that price." Holland discovers he has led out a colt he did not intend to sell. Holland is bound.

2. Lober writes, "I will sell you 10,000 bushels of wheat at 80 cents a bushel." Anson, in honest reliance upon the offer, replies, "I will accept your offer." Lober asserts that he intended to write, and thought he had written, "1000 bushels." Lober is bound to deliver 10,000 bushels or pay damages for nondelivery.

Agreements must be definite and clear enough to enable a court to understand and enforce the terms. Indefinite and uncertain agreements are unenforceable, because the court will not make or complete contracts for parties.

Examples. 3. "I will sell you one hundred acres of land for $1000." "I accept." This is too uncertain, because no definite one hundred acres are indicated.

4. "I will sell you one hundred bushels best-grade Irish potatoes for $60." "I accept." This is definite enough, because no particular one hundred bushels need be specified.

5. "I will give as much for your horse as Bridges says he is worth." "I accept." This is definite enough, because a way of ascertaining the price has been agreed upon.

6. "Send me one hundred bushels of potatoes." The potatoes are delivered. This is enough. The market price is understood.

13. Classes of agreements. Contracts serve three main purposes: namely, to create rights, to transfer rights, and to extinguish rights. An agreement which creates a right is called a contract. An agreement which transfers a right is called a contract of assignment. An agreement which extinguishes or wipes out a right is called a contract of release or discharge.

Examples. 1. Dickerson and Thornton agree that Dickerson shall sell and deliver his piano to Thornton for $400, which Thornton agrees to pay sixty days after such delivery. This is a contract. When Dickerson delivers the piano, he has performed his part and has a right against Thornton to demand the $400 in sixty days.

2. Dickerson agrees with Bruce to transfer to Bruce this right to collect from Thornton in exchange for an automobile to be delivered by Bruce to Dickerson. When done this is an assignment by Dickerson to Bruce of Dickerson's right against Thornton to the $400.

3. Bruce, who now owns the right against Thornton, agrees with Thornton to accept and does accept a buggy as the equivalent of the $400. Bruce thereby discharges the right against Thornton.

14. Agreements originate in some form of offer and acceptance. An offer is an expression by one person of his willingness to become a party to an agreement in accordance with terms expressed or indicated. Acceptance is the expression by the person to whom the offer was made of his willingness to do or refrain from doing what the offeror (person making the offer) requires.

The offer may be of a promise or of an act. The acceptance may be the giving of a promise or the doing of an act. No words need be used. We may have a contract in which there is a promise for a promise, that is, a promise is made on each side; this is called a bilateral executory contract. Or we may have a contract in which there is a promise made on one side and an act performed on the other; this is called a unilateral executory contract. When both parties have fully performed the contract, it is said to be an executed contract. When a promise is put into words, it is said to be an express promise; when it is implied or inferred from acts or conduct, it is called an implied promise.

Examples. 1. *Promise for promise*: "I will work for you for one month for $100." "Agreed." There is an outstanding promise on each side before any act is done.

2. *Promise for act*: "I will pay you $10 if you find and return my lost watch." The offeree (person to whom the offer is made) finds and returns the watch. The contract is then complete. There is an outstanding promise on one side.

3. *Act for promise*: A newspaper is sent regularly to a person who takes and reads it as often as it reaches him. The offer is in the sending of the paper. The promise to pay for it is implied from the receiving and using it.

There are certain rules governing offer and acceptance that are often applied in order to decide whether an agreement has been reached. These will be briefly stated.

1. The offer must be communicated to the offeree. This, as we have seen, may be by oral or written words or by acts and conduct. However expressed, the offer must actually reach the offeree or there can be no acceptance by him. The offer may be made to all the world but must be accepted by some definite person.

Example 4. Hotchkiss publishes in a newspaper an offer of $10 reward for the return of his lost watch. Holden returns the watch, not knowing that such a reward has been offered. Afterward Holden learns of the offer and claims the reward. He cannot compel Hotchkiss to pay it, because the act was not done relying upon the offer or with knowledge of it. (But some states allow a recovery upon no very well-defined principle.)

2. The acceptance must be either communicated or else actively shown in a manner allowed by the terms of the offer. Forming an intent in one's mind to accept is not enough; the mental intent must be clearly indicated.

If the person making the offer has stated how acceptance shall be indicated, the person receiving the offer may do what is required without actually communicating with the offeror; but stating that silence shall be deemed an acceptance will not make it so, since the offeror cannot impose on the offeree the obligation to speak. Speech or action is necessary. When an offer is sent by mail, it is understood that the offeree may indicate assent by mailing an acceptance; and the contract is complete when the letter is mailed, although it may never be received by the offeror.

Examples. 5. Lee writes Schenkle: "I will give you $100 for your radio set. If within ten days I do not hear from you to the contrary, I shall consider that you accept." No answer is returned to Lee. There is no contract, even though Schenkle has mentally determined to accept. Mere silence does not give consent. If Lee had stated some act that Schenkle was to do to indicate assent (as, for example, having the set at Talcott's house), the doing of the act with the intent to accept would be enough.

6. Sheperd advertises that if anyone buys and uses his medical remedy as directed and afterward contracts any disease caused by taking cold, he will pay to such person $100. Cahill buys and uses the medicine as directed and afterward contracts a cold and disease caused by the cold. Sheperd is held liable to pay Cahill the $100. Sheperd's acceptance of Cahill's offer is manifested by buying and using the medicine as directed, with knowledge of the offer. It is not necessary for Cahill to communicate his acceptance to Sheperd.

7. Gibbons posts a letter to Gowdy, offering to sell his truck to Gowdy for $1000. Gowdy receives the letter on Monday, and on Tuesday posts a letter directed to Gibbons, accepting the offer. The letter is lost in the mails and never reaches Gibbons, who on Friday sells his truck to Cline. Gibbons is liable to Gowdy in damages for breach of contract, for the contract was completed by acceptance as soon as Gowdy posted his reply. If Gibbons wishes to guard against this, he should say in his letter, "Upon receiving your acceptance the sale will be closed," or use some similar phrase especially requiring that the acceptance should be actually received. By using the mails the offeror impliedly invites the offeree to use the mails, with the result indicated. If Gibbons's offer were spoken face to face, there would ordinarily be no implied invitation to use the mails for an acceptance. But there might be an invitation either expressed or gathered from circumstances; for instance, if Gowdy lives at a distance and is told by Gibbons to go home, think it over, and let him know, Gowdy may use the mails, and his acceptance is complete when the letter containing it is duly posted.

3. The acceptance must be absolute and in accordance with the terms of the offer. If the offeree qualifies his acceptance in any way, it is not an acceptance but merely a counter offer to be accepted or rejected by the original offeror. A qualified acceptance amounts to a rejection of the offer, which cannot thereafter be accepted so as to bind the offeror.

Example 8. Horner offers his hay to Glass for $150. Glass replies, "I will take the hay at $125." Horner refuses. Glass then says, "I will take it at $150." Horner refuses this. Glass sues Horner for breach of contract. Glass will fail. Glass's acceptance at $125 was a rejection of the offer at $150, and the offer was at an end.

4. An offer may be changed or withdrawn before acceptance. An unaccepted offer binds no one. The offeror may change or withdraw it at any time before the offeree accepts it. If, however, the offeree has paid a consideration for the option to accept or reject, or if, in some states, the offer is under seal, the offer is in the form of a contract and cannot be varied or revoked. An acceptance of the offer concludes the contract and it cannot afterward be withdrawn. But there must in fact be an offer. Merely sending out a circular of prices, or advertising prices in a newspaper, is not an offer, but is merely an invitation to deal with the advertiser.

Examples. 9. Lincoln offers Case some shoes for $150 and gives Case twenty-four hours in which to accept. In an hour Lincoln withdraws his offer; but Case, an hour later, accepts. There is no contract. There was no consideration for Lincoln's promise to give Case twenty-four hours to accept, and Lincoln may revoke his offer before Case actually accepts.

10. Stagg gives Tracy an option to take 1000 bushels of wheat on September 1, at 90 cents a bushel, for which option Tracy pays Stagg $40. Stagg withdraws the option before September 1, but on that day Tracy accepts. Stagg is liable to Tracy for refusal to deliver. The offer is not subject to withdrawal.

5. The offeree must have notice of the withdrawal of the offer. An offeree may accept within the time fixed, or, if none be fixed, within a reasonable time after the offer was made, unless he has notice before his acceptance that the offer is revoked. It seems that the notice need not necessarily come from the offeror, it being sufficient that the offeree actually learns from any source that the offer is withdrawn.

Examples. 11. Payne writes Cave, "I will sell you my books for $150." The next day Payne writes Cave, "I withdraw the offer." The following day, and before receiving the letter containing the withdrawal, Cave posts an acceptance. The contract is complete, since Cave had no notice of the withdrawal before acceptance, and acceptance is complete when the letter is mailed. Revocation is not complete until received.

12. Bolton offers Lambert a carload of apples at $1000 and gives Lambert two days to accept. The next day Bolton sells the apples to Covert, who tells Lambert the apples are his (Covert's). Lambert then accepts. There is no contract. Lambert knew when he accepted that the offer had been revoked by a sale to Covert.

6. An offer may end without express withdrawal. If a time is fixed, the expiration of the time revokes the offer. If no time is fixed, the offer ends after the expiration of a reasonable time; what is a reasonable time must depend upon the circumstances of the case. An offer is ended by the death of either offeree or offeror.

Examples. 13. On June 1 Ellis offers Jenkins $50 for a dog. Jenkins accepts the offer in August. This is not a reasonable time where the parties live near each other. Even a week might be too long.

14. Gray writes Swift, "I will sell you my farm for $3000." Before Swift posts his acceptance Gray dies. The offer is revoked by Gray's death. But if Swift posts his acceptance before Gray's death, the contract is binding upon Gray's estate.

II. Competent Parties

15. Infants. An infant is a person under the age of twenty-one. In many states women become of age at eighteen, and in some they are of age at eighteen, or even younger, if married.

A person becomes of age on the day preceding his twenty-first birthday, that is, on the last day of his twentieth year. If the twenty-first anniversary of one's birthday is November 8, he can vote or make binding contracts on November 7.

Contracts made during infancy are voidable[1] at the infant's choice, indicated either during his infancy or after he attains his majority, subject to these exceptions: (1) contracts for necessaries are binding; (2) contracts made during infancy but ratified after attaining majority are binding. But an infant's contracts are binding upon the adult with whom they are made; the infant alone can repudiate them if he wishes.

1. Necessaries include not merely the things required to sustain life, but also such additional articles as are suitable to the infant's social position in life and to his circumstances when they are purchased. Food, lodging, clothing, medical attendance, and elementary schooling have been held to be necessaries, but horses, watches, jewelry, tobacco, bicycles, traveling expenses, and insurance have been held not to be necessaries. The courts are not disposed to go beyond the list of articles needed to sustain life without luxury. Even as to necessaries the person who furnishes them cannot recover if the infant was already adequately supplied. If one can recover against an infant for necessaries, he can recover only the reasonable value, not what the infant may have agreed to pay.

2. Ratification takes place when, upon attaining his majority, the infant promises to pay or does an act which is a clear recognition of his liability. Some states require a ratification to be in writing, but this is not generally so.

[1] A voidable contract is one which may be set aside and the performance of it avoided, if one party chooses to avoid it. A void contract is of no force or validity, no matter what the parties may desire. It is often said that an infant's appointment of an agent is void, but this is so doubtful that the statement is not made in the text (see section 132 *post*).

Examples. 1. Clyde, an infant, agrees to work for Meny for a year at $50 a month. He works a month and then quits. Meny has no action against Clyde for breach of contract. Clyde may recover against Meny for the labor performed.

2. Same contract. At the end of a month Meny discharges Clyde without cause. Clyde has an action against Meny for breach of contract. The adult is bound but the infant is not.

3. Ryder, an infant, purchases jewelry of Chandler. Chandler cannot recover the price from Ryder, although if Ryder pleads his infancy as a defense to the action, the title to the jewelry will revest in Chandler. It is immaterial that Chandler thought Ryder was an adult. It is immaterial that Ryder represented that he was of age, although Ryder might in such a case be liable in tort for deceit for damages.

4. Dilk, an infant, purchases clothing for himself of Wharton. Dilk is liable, provided Wharton can show that Dilk was not adequately supplied according to his station in life. But although Dilk promised to pay $50 for the clothing, Wharton can recover only its actual value.

5. Clary, an infant, purchases jewelry, not necessaries, of Peters. After attaining his majority Clary promises to pay for the jewelry. Clary is now liable upon the theory of ratification.

6. Lynch, an infant, purchases a horse of Johnson and pays for it. Lynch may return the horse during infancy or within a reasonable time after reaching twenty-one and recover the money. This is disaffirmance, the opposite of ratification.

7. Same purchase. The horse dies. Lynch may recover his money from Johnson. When an infant disaffirms, the adult may recover what he parted with, if the infant still has it; but if it is lost or destroyed, the adult is nevertheless bound to return to the infant whatever he received from him.

16. Insane persons. If one contracts with an insane person, knowing him to be insane, the contract is voidable by the lunatic. Statutes provide methods by which persons suspected of insanity may be brought before a court and the sanity judicially decided. The insane person's property is then under the control of a guardian or committee appointed by the court. The appointment of a guardian or committee makes the lunatic's contracts void, since the entire control of the lunatic's business affairs is transferred to the guardian.

If one contracts in good faith with a person not known to be insane, but who is so in fact, the contract may be upheld if it is so

far executed that to avoid it would damage the innocent party; if, however, it can be avoided and the sane party restored to the condition in which he was before the contract, the lunatic may avoid it even in this case.

An insane person is, like an infant, liable for necessaries. If he afterward recovers his reason, he may ratify contracts made while insane.

Idiots' contracts stand substantially upon the same footing as the contracts of insane persons.

An intoxicated person, if so much intoxicated as to be unable to understand and appreciate the nature of his acts, may avoid a contract made while in such a condition.

17. Married women. At common law married women were incapable of making any contracts binding on themselves, although they could acquire very limited rights by contract. The married woman could bind her husband, not herself, upon a contract for necessaries.

This common-law disability has been largely removed by statutes. These vary in the different states, but in general a married woman may now make contracts as freely as an unmarried woman, except that a married woman cannot, in some states, contract with her husband or become a surety for another. These statutes are too numerous to be considered further.

18. Corporations. These artificial legal beings have no power to make any contracts except those incidental to the business for the transaction of which they were incorporated. The effect of a contract which is outside the corporate powers is discussed in a later section (see section 168 *post*).

III. Consideration

19. Necessity of consideration. Save in the case of sealed contracts (and now in many states even as to these), every promise contained in a contract must rest upon a consideration in order to be enforceable. A contract not under seal is called a simple contract. A sealed contract is sometimes called a deed or a specialty; if for the payment of money, it is often called a bond.

Consideration consists in some legal detriment[1] suffered by the promisee's relying upon the promise, and there is usually some corresponding benefit to the promisor. Unless such consideration can be shown by the promisee, he cannot enforce the promise against the promisor. Hence gratuitous promises, or promises in return for which nothing is given, are unenforceable. A mere moral obligation to do a thing is not a consideration for a promise to do it.

In negotiable instruments the law presumes consideration, but the promisor may show that none exists.

At common law sealed instruments require no consideration. Some states by statute now provide that in sealed instruments there must be a consideration, but presume from the seal that there is consideration, leaving the promisor to show, if he can, that there was really no consideration. In many states the distinction between sealed and unsealed instruments has been abolished and the seal creates no presumption of consideration.

Examples. 1. A father makes and presents to his son a negotiable promissory note as a gift. The son cannot enforce it if the father sets up want of consideration as a defense. The son has suffered no legal detriment nor has the father received any benefit.

2. The son negotiates the note before maturity to Jones, who pays the son for it in good faith. Jones may enforce it against the father because Jones has suffered a legal detriment in parting with his money, relying upon the father's promise (see section 119 *post*).

3. A father says to his son, "I will give you $500 if you refrain from smoking until you are twenty-one." The son refrains. He may enforce the promise. He has suffered a legal detriment in doing what he was not legally bound to do.

4. Hoffman promises Sullivan that he will repair Sullivan's watch free of charge. He afterward refuses to do so. Sullivan has no remedy. There is no consideration for Hoffman's promise. Sullivan has suffered no legal detriment in reliance on Hoffman's promise.

20. The consideration need not equal the promise in value. The law allows persons to affix their own value to acts or forbear-

[1] Legal detriment means giving up something which a party has a right to keep or doing something which he is not under a legal obligation to do. The promisor is the person making the promise; the promisee is the person receiving it.

ances. If the promisee does or refrains from doing anything he is not bound to do or to refrain from doing, there is sufficient consideration. But if the promisee does or forbears something he is already bound to do or forbear, there is no consideration. The problem in many cases is whether the promisee has done or forborne what he was not under a legal obligation to do or forbear. Such cases will be considered in examples.

Examples. 1. John Doe promises Richard Roe that if Roe will name his child after John Doe, the latter will pay Roe (or the child) $1000. Roe names the child after Doe. He may recover the $1000. He has done what he was not legally bound to do.

2. Fildman agrees to pay Fox $200 for a coat worth but $50. Fox agrees to deliver the coat to Fildman for $200. Fox may recover the $200. Fox makes a promise which he is not bound to make, and which Fildman may enforce against him, and this is a consideration for Fildman's promise.

3. Warner has a horse belonging to Ashley which he wrongfully refuses to deliver up. Ashley promises Warner $50 if he will deliver it, and Warner does deliver it. Warner cannot recover the $50. He has merely done what he was legally bound to do.

4. *Successive promises:* Mills contracts to dig a well for Capper for $60. When down a few feet, Mills strikes rock and refuses to go on. Capper promises Mills an extra $25 if he will finish the well. (1) Most courts say Mills cannot recover the extra $25 because he merely did what he was already bound to do. (2) A few courts say Mills was not bound to go on because he had an option to stop and pay damages for the breach of contract and that Mills therefore did what he could not be legally compelled to do. (3) A few courts say that the old contract was by agreement canceled and a new one for $85 was made.

5. *Payment of smaller sum:* Jacobs owes Leary $100. Leary says, "If you will pay me $60, I will release the other $40." Jacobs pays the $60. Leary may also recover the other $40. The payment of a smaller sum in satisfaction of a larger is not a sufficient consideration to support a promise to release the balance, because Jacobs is already legally bound to pay the $60. But if, by agreement, Jacobs also gives Leary a jackknife, he has done what he was not legally bound to do, and the $40 claim is discharged.

6. *Composition with creditors:* Whittaker owes various creditors,—Phillips, Joseph, Kroner, and others. Whittaker agrees to pay each 60 per cent of his claim, provided he and all others will release Whittaker from the balance; they all agree to do this. Whittaker pays each 60 per cent. Phillips afterward sues Whittaker for the remaining 40 per cent of his claim.

Phillips cannot recover. This is called a composition with creditors. The reasons given for upholding it are not consistent, but it is often said to be an exception based upon the policy of encouraging such compositions and upon the policy of forbidding one creditor to recover more when by a kind of mutual arrangement all have consented to take the same percentage.

7. *Mutual subscriptions:* The Brownsville church is raising money for a new bell. Ogg, Tweddle, and Galloway subscribe each the sum set opposite his name. May these promises be enforced? Is there any consideration for them? (1) Most courts say there is none unless the Brownsville church has acted upon the promises by purchasing a bell or contracting for one. (2) Other courts think the promises mutually support each other, and that Tweddle subscribes in consideration of Ogg's subscription, etc. (3) Other courts think the Brownsville church, by accepting the promises, agrees to carry out the plan, and that this promise is the consideration for the promises of the subscribers.

21. A past consideration will not support a promise. A past consideration is one performed or finished by Jones without request and before any promise is given by Smith. If Smith should afterward promise something to Jones by way of compensation or reward for the benefit conferred by Jones's act, this promise would rest upon a past consideration and would be unenforceable.

Examples. 1. Jones, without Smith's knowledge or request, moves a stack of hay standing on Smith's farm, in order to save it from a spreading fire. When Smith learns of this, he promises to pay Jones for his time and trouble. This promise is unenforceable because it rests upon a past consideration.

2. Dicker finds a lost article and returns it to Smith, the owner. Smith promises to pay Dicker a certain sum by way of reward. Dicker cannot recover upon this promise; it rests upon a past consideration.

To this rule there are certain apparent exceptions.

1. If there is a request by Smith that Jones move the stack or that Dicker search for the lost article, the law implies a promise to pay for the service; and when Smith expressly promises to pay, he is merely confirming or restating the implied promise, and his expressed promise is substituted for the implied one and is enforceable.

2. If there is some legal bar to enforcing a contract against Smith, which he may set up or not, he may, under certain circum-

stances, by a later promise, render himself liable on such a contract notwithstanding the bar. Such legal bars are infancy, the Statute of Limitations (outlawing debts after a given period), discharge from debts in bankruptcy, and the like.

Examples. 3. McCabe, an infant, purchases jewels of Gillis. When McCabe reaches twenty-one he promises to pay for them. McCabe is liable to Gillis. Some say McCabe's promise rests upon the past consideration, that is, the delivery of the jewels, and that Gillis suffers no detriment from relying upon the new promise. Others treat McCabe's promise merely as a waiver of his plea of infancy, and thus escape the difficulties of consideration.

4. Hodges owes O'Brien a debt which is barred by the Statute of Limitations, that is, a statute providing that an action for debt or breach of contract must be begun within a certain time (usually six years). If O'Brien sues Hodges, the latter may plead the statute and escape. But after the debt is barred, Hodges promises to pay it. Hodges is now liable. The case is practically the same as that of the infant.

5. Acker owes Barber a sum of money. Without any new consideration Acker gives Barber a chattel mortage or other security. The chattel mortgage is enforceable. The old debt, although a past consideration, is sufficient to support it.

22. The consideration must be legal. Illegal contracts will be dealt with later. It is enough to say here that if A's promise rests upon a counter promise or an act of B's which is illegal, then A's promise cannot be enforced. Thus, A promises to pay B a sum of money if B will steal a picture from C. B steals the picture. He cannot recover the sum promised, because his act constituting the consideration is illegal. So also promises to pay money lost in gambling are unenforceable because all gambling or wagering contracts are illegal.

IV. Form: Writing; Seal

23. Statute of Frauds. The Statute of Frauds (so called because it was intended to prevent fraud and perjury in the proving of contracts before the courts) was enacted by the English Parliament in 1676 and has been reënacted, in whole or in part, by most of the American states. Two sections of this statute, the fourth and the seventeenth, are those that deal particularly with contracts.

1. *Fourth section.* The fourth section provides in substance that in order to be enforceable the following contracts, or some note or memorandum of them, shall be in writing and signed by the party to be charged (that is, the one against whom it is sought to enforce the contract) or by his authorized agent:

a. The promise of an executor or administrator to pay out of his own estate that which is due from the estate he is administering.

b. The promise to answer for the debt, default, or miscarriage of another, that is, to be surety that another will pay his debts or discharge any of his legal obligations (see Chapter VIII).

c. The promise to do anything, as transfer property, in consideration of marriage, that is, where the marriage is the consideration for such promise.

d. Any contract to sell or any sale of lands, or any interest in or concerning lands (though in the United States generally leases for less than one year are excepted).

e. Any contract which by its terms is not to be performed within the space of one year from the time of the making thereof; but if it may be fully performed within one year, it does not require a writing.

Examples. 1. Garr dies and leaves a will appointing Ryder his executor. Garr owed Coke $100. Ryder, the executor, promises Coke that he will pay the $100 out of his own (Ryder's) funds.

2. Durham asks Nevitt, a grocer, to sell him goods on credit. Hill promises Nevitt that he will pay the bill if Durham does not.

3. McKenna tells Miss Haskett that if she will marry him, he will transfer to her some railroad stock. The marriage occurs.

4. Wambough agrees to sell his farm to Butler for $14,000.

5. Hanover agrees to work for Walker as a chauffeur for three years from the date of the agreement.

All these promises are within the fourth section of the Statute of Frauds and are not enforceable unless they, or some memoranda of them, are in writing and signed by the promisors.

It must be observed that this requirement is in addition to all other requirements. All contracts require a true agreement, competent parties, and consideration. These contracts (named above

as especially mentioned in the Statute of Frauds) require agreement, competent parties, consideration, and also a writing duly signed. Most contracts may be proved by oral evidence; these contracts may be proved only by a writing. The writing may be a mere memorandum stating the chief points in the agreement, or it may even consist of a series of letters so connected as to make together a complete memorandum. Careful persons will make a full memorandum, being particular to name the parties, the subject matter, the consideration, and the terms and conditions, and to have this memorandum signed by both parties to the contract. If the writing fails to state any important term, it is unenforceable, for that term would have to be proved by oral evidence, and the statute forbids this.

In many states additional contracts are required to be in writing, as, for example, a promise to pay a debt discharged in bankruptcy, a promise to pay a debt barred by the Statute of Limitations, a promise after reaching twenty-one to pay a debt contracted during infancy, the acceptance of a bill of exchange, a fire-insurance policy, a limited partnership, a common-law marriage, and many others. Whether a particular contract must be in writing in a given state can be learned only after a careful examination of the statutes of that state.

2. *Seventeenth section.* The seventeenth section of the English Statute of Frauds provided that a contract for the sale of goods, wares, and merchandise (that is, any personal property) of the value of ten pounds or upward should be unenforceable unless the buyer accepted part of the goods so sold and actually received the same, or gave something in earnest to bind the bargain or in part payment, or unless there be a note or memorandum in writing signed by the party to be charged or by his authorized agent. American statutes have closely followed this model.

It will be observed that a contract to sell land can be proved in only one way, namely, by a writing, while a contract to sell goods of the value of $50 or more may be proved in any one of three ways, namely, by the acceptance and receipt of the goods or a part of them, by a part payment of the price or payment of earnest money, and by a writing. States differ as to the value below which

no special form is required. Some fix it as low as $30, and one as high as $2500. Several states do not have this portion of the statute at all.[1] In these states a contract to sell goods, no matter of what value, may be proved by oral evidence, although there has been neither delivery nor payment.

Examples. 6. Rutan agrees to sell Conrad 1000 boxes of oranges for $3000. There is no writing, no delivery of the goods, and no payment. The contract is unenforceable if either party takes advantage of the Statute of Frauds.

7. If Rutan had delivered ten boxes and Conrad had accepted them, or if Conrad had paid and Rutan received $1000 on the price, or if a memorandum had been made, signed by both parties, giving the names of buyer and seller, description of the goods, price, date, and place of delivery and other terms, the contract would have been enforceable, notwithstanding the Statute of Frauds.

It is difficult at times to say whether a sale is of real property or of personalty. By the Uniform Sales Act (see section 52 *post*) and the majority American rule a contract for the sale of articles attached to or forming a part of land (as, for example, standing trees, unripe fruit, grass or grain, or a building), by which such articles are to be removed from the land at any time, is considered a contract for the sale of personal property.

The so-called parol-evidence rule prevents either party to a contract or other written document from introducing oral evidence to vary or contradict the written terms of the instrument. For

[1] It is not found in Alabama, Delaware, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Texas, Virginia, and West Virginia.

In the following states the sum is fixed at $30: Arkansas and Missouri.

In the following states it is fixed at $50: Colorado, District of Columbia, Georgia, Indiana, Maryland, Michigan, Minnesota, Mississippi, New York, Oklahoma, Oregon, South Carolina, Vermont, Washington, Wisconsin, and Wyoming.

In Connecticut and Hawaii, it is fixed at $100.

In California, Montana, Nevada, and Utah the amount is $200.

In Alaska, Arizona, Idaho, Illinois, Maine, Massachusetts, Nebraska, New Hampshire, New Jersey, North Dakota, Pennsylvania, Rhode Island, South Dakota, and Tennessee the sum is $500.

In Ohio the sum is fixed at $2500.

In the following states a contract for the sale of goods of any value, however small, must conform to the Statute of Frauds: Florida and Iowa.

this reason it is advantageous to have contracts in writing, even though the Statute of Frauds may not require a writing.

24. Contracts under seal. Any contract may be made in writing, under seal. Generally conveyances of land must be under seal; but in many states by recent statutes a seal is not necessary to a conveyance. Statutes may require other contracts or conveyances to be sealed, but the modern tendency is to decrease rather than to increase the importance of the seal. An unsealed contract is called a simple contract.

A seal at common law was an impression on wax or other adhesive substance, affixed to the document to be sealed. In the Middle Ages, when few persons could write, each important person had his own seal, or signet, which took the place of his signature. In modern times a mere scroll (such as a square or circle) with the pen is declared by statute, in most states, to be a sufficient seal. The commonest form is to write the word "seal" after the name and make a rough circular scroll around it with the pen. Frequently the letters "L.S." are used as a seal. They stand for *locus sigilli*, which is Latin for "the place of the seal."

While very few contracts *must* bear a seal, any contract *may* bear one. If a contract is sealed, it has certain characteristics which it would not have if it were unsealed. Chief among these are the following:

1. At common law the contract under seal does not require any consideration. For example, a father promises under seal to pay his son one thousand dollars, this being merely a gift without consideration. Such an instrument is called a bond and is enforceable. Were such promise made in an unsealed instrument, the son could not enforce it for want of consideration. Were it made in a negotiable promissory note, the son could not enforce it; but if he negotiated it to another person who paid value and had no notice of the absence of consideration, the transferee could enforce it.

By statute in many states the common-law rule upon this point has been changed and the seal is made merely presumptive evidence of consideration; that is, it dispenses with the necessity of the proving of consideration by the one who seeks to recover upon the instrument, but it leaves the de-

fendant free to prove that there was no consideration and thus to defeat the instrument. This is true in Alaska, Arizona, Arkansas, California, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, and Washington.

In some states a sealed contract is by statute put upon precisely the same basis as an unsealed contract; that is, seals are practically abolished. This is the rule in Alabama, Michigan, New Jersey, New York, Oregon, and Wisconsin.

2. Only the parties named in a sealed instrument may sue or be sued upon it. In an action upon an unsealed contract it may be shown that a party named is in fact an agent for a party unnamed, and the latter may sue or be sued upon such unsealed contract.

3. A right of action upon a sealed contract is not usually barred by the Statute of Limitations as soon as an action upon a simple contract. The period allowed upon a sealed contract varies in the different states from ten to twenty years, while the period allowed upon a simple contract is usually not more than six years.

Examples. 1. "I promise to pay John H. Blackheath one thousand dollars on February 10, 19—. WILLIAM BLACKHEATH." This is a simple contract to pay money; if made as a gift, no one can enforce it.

2. "I promise to pay to John H. Blackheath, or order, one thousand dollars on February 10, 19—. WILLIAM BLACKHEATH." This is a negotiable promissory note. If made as a gift, John cannot enforce it; but he could negotiate it to another person who might enforce it.

3. "KNOW ALL MEN BY THESE PRESENTS: That I, William Blackheath, am held and firmly bound unto John H. Blackheath in the sum of one thousand dollars to be paid to the said John H. Blackheath, his executors, administrators, or assigns, on February 10, 19—; to which payment I bind myself, my executors and administrators by these presents.

"Witness my hand and seal this tenth day of February, one thousand nine hundred and ——.

WILLIAM BLACKHEATH. [Seal]"

This is a bond. Although made as a gift, John may enforce it at common law.

V. LEGALITY OF OBJECT

25. Contracts made illegal by statute. The statutes may declare a contract to be illegal, may prohibit it, or may simply penalize, or punish, the parties for making it. It is a question of construction by the courts whether prohibited and penalized contracts are illegal.

1. Certain contracts are declared by statute to be illegal. Such are contracts for gambling or wagering, contracts for usurious or excessive interest, in some states contracts for work, labor, or any unnecessary act to be performed on Sunday, and in some states any contract made on Sunday, even though performance is to be made on a week day. These contracts will not be enforced by the courts.

2. Certain acts are prohibited by statute. A contract to perform a prohibited act, or involving such an act, would be an illegal contract.

Example 1. Statutes frequently prohibit any person from engaging in the practice of medicine without first obtaining a license. An unlicensed physician cannot recover compensation for professional services. A teacher cannot recover for his services in a public school unless he is duly licensed.

3. Certain acts are penalized or punished by statute but are not in terms prohibited. In such cases it is a question of construction by the courts whether a contract to do the act is illegal.

Examples. 2. A statute provides that anyone who sells a lot in a plat in any city without first recording the plat in the county clerk's office shall pay a penalty of $50 for each offense. Diamond sells Hall a lot in an unrecorded plat. Hall afterward refuses to take the lot and pay the purchase price. Is the contract of sale of this lot an illegal contract? It has been held not, because the court thought it was not the object of the statute to prohibit such sales, but merely to make it so expensive to deal in lots in unrecorded plats that landowners would be induced to record the plats.

3. A statute fixes a penalty for the sale of adulterated foods. Lyons sells to Styles a quantity of milk adulterated with water. Styles is not bound. He may refuse to take the goods and pay the price, on the ground that Lyons's contract is illegal. The intent of the statute is to prevent the sale of adulterated goods.

26. Wagering contracts. A wagering contract is an agreement to give money or property upon the determination or ascertainment of an uncertain event. The consideration for such promise may be either a like promise or something given outright.

Examples. 1. Hawley and Douglas contract that if Hawley's horse wins a race with Douglas's horse, Douglas shall pay Hawley $100; but if Douglas's horse wins, Hawley shall pay Douglas $100.

2. Hatch promises to pay Wendell $100 in case Wendell's horse wins, provided Wendell pay Hatch in hand $20. If Wendell's horse wins, Hatch would pay Wendell $100 and would be $80 out of pocket; if Wendell's horse loses, Hatch has his $20 and Wendell is that much out of pocket.

3. Carr, Jamison, and Skiff each pay an entrance fee as a condition of competing for a purse or prize at a horse-racing contest. This is not a wager unless the competitors are the sole contributors to the purse and thus practically bet each against the others, or unless this form is adopted as a scheme to conceal a wager.

It seems that by the common law of England wagering contracts were not illegal. Judges later regretted that the law was not otherwise, and became very quick to discover reasons for holding particular wagers illegal, as, for example, that a wager on the life of Napoleon was illegal because it gave one wagerer an interest in keeping the king's enemy alive and the other an interest in compassing his death by means other than lawful warfare. But even with such refinements as these the courts felt bound to enforce many wagers. In a few American states wagers were held to be legal at common law, but in a majority the courts refused to follow the English rule and held them to be illegal. Now, by statute, they are generally declared to be illegal in all jurisdictions.

1. *Wagers on the rise and fall of prices.* The form of this wager is that one party sells another grain or stock for future delivery at a specified price; but in fact neither party intends an actual delivery, and both intend to settle on the delivery day the difference between the contract price and the market price in money. It is equivalent to betting that the market price on a certain day will be so much. Often these take the form of "options" as well as "futures"; that is, Harris sells White the option to call for wheat on a certain

day at a certain price, or Harris sells White the option to deliver wheat on that day at a certain price, or Harris may sell White the option to call at one price or deliver at another; the first is termed a "call," the second a "put," and the third a "spread" or a "straddle." Whenever the intent is merely to settle the gain or loss in money, and there is no intent to deliver or receive the article itself, the transaction is a gambling contract and illegal.

Examples. 4. "I have sold John Ballard 100 shares of stock in the DeBoy Steel Co. at 85 per cent, payable and deliverable at seller's option in thirty days. Richard Trimble." This may be a valid contract giving the seller the right to deliver the stock at any time within thirty days at $85 a share (par value $100); or it may be intended that on any day when that stock is worth say $80 a share, the transaction shall be closed by the buyer's paying the seller $500. The transaction must be closed at the end of thirty days if not closed earlier.

5. "For value received the bearer may call on me for 10,000 bushels of wheat at 70 cents a bushel on September 1, 19—. Joel Dudley." This is a "call." The buyer on September 1 will "call" for the wheat if it is more than 70 cents a bushel, but not if it is less. If it is more, he makes the excess above 70 cents, less what he paid for the option; if it is less, he loses what he paid for the option. When the differences are intended to be settled in money, this is a gambling contract, but it is perfectly valid if actual delivery is intended.

6. "For value received the bearer may deliver to me 10,000 bushels of wheat at 70 cents a bushel on September 1, 19—. Johnson Sykes." This is a "put." If wheat is 60 cents a bushel on September 1, the seller will "put" it on Sykes, who must pay 10 cents a bushel to the seller. The latter thereby makes $1000, less what he paid for the option. If it is more than 70 cents a bushel, the seller will not "put" it, and he loses what he paid for the option. But this contract is valid if actual delivery is intended.

7. "For value received the bearer may call on me for 10,000 bushels of wheat at 80 cents a bushel any time in sixty days from date; or the bearer may at his option deliver the same to me at 75 cents a bushel. Harry Deyo." This is a "spread." If the call and put prices were the same, it would be a "straddle." If actual delivery is intended (as it rarely is), this would be a valid contract; but if it is intended to settle gains or losses in money, it is a gambling contract.

2. *Insurance.* Insurance was at one time a favorite wagering contract. Thus, persons not at all interested in a ship or its cargo would take out insurance upon it, in order that if it was lost they

might recover the amount named in their policies. Very often insurance was taken upon lives in which the policyholder had no interest. This is in general made illegal by statute. In order that an insurance policy may be legal, the one insured must have some insurable interest in the property or the life covered by the policy. (See section 90 for discussion of insurable interest.) Even in cases where the insured has an insurable interest the insurance contract is a kind of wagering contract, but it is one permitted by the policy of the law.

27. Contracts illegal at common law. The common law has indicated a very considerable number of instances in which it will regard contracts as illegal because contrary to public policy. Only a few of them can be enumerated.

1. Contracts to commit crimes or civil wrongs (torts) are illegal. Thus, a contract to beat another would be illegal for both reasons, since an assault is both a crime and a tort.

2. Contracts to do acts which injure the public service or interfere with the administration of justice are illegal. A contract by a mayor to appoint another to office or by a voter that he will vote for another for office, to influence legislators by lobbying, to quiet competition for public contracts, to prevent the prosecution for a public offense, to carry on a suit as an attorney at the expense of the attorney and share the proceeds with the client (champerty), to procure witnesses to swear falsely, and the like, are all illegal.

3. Contracts which affect the freedom or security of marriage are illegal. Such is a contract to procure a divorce by consent and without contest; and such is a marriage-brokerage contract, that is, a contract by Brown to procure or bring about a marriage between John and Mary for a consideration paid or to be paid by either John or Mary to Brown.

4. Contracts in restraint of a trade, business, or profession may be legal or illegal, according as the restraint is reasonable or unreasonable. Such a contract is reasonable when it is reasonably necessary to protect the promisee and not injurious to the interests of the public. Beyond this point it is unreasonable and illegal.

The great increase in trusts and monopolies within recent years has caused the Federal legislature and many state legislatures to

enact laws on the subject of restraint of trade. Congress, in 1887, passed the Interstate Commerce Act to provide for the regulation of interstate transportation; in 1890 it passed the Sherman Anti-Trust Act to regulate interstate commerce, aside from transportation and banking, and by that act made contracts in restraint of interstate trade and contracts attempting to create monopolies in such business illegal and persons entering into such contracts guilty of a misdemeanor; in 1914 it passed the Clayton Act, which specifies certain acts which shall be deemed to be unreasonably in restraint of trade and illegal, and it also passed the Federal Trade Commission Act, which constitutes the Federal Trade Commission the regulator of interstate commerce, with power to inquire into acts in restraint of trade and to issue orders which are subject to review by the courts. Various state acts also provide against contracts which tend to monopoly or restraint of trade within the several states.

Examples. 1. Ball buys Campbell's retail shoe store in the city of Dayton, and Campbell agrees not to engage again in the shoe trade in Dayton. This is reasonably necessary to protect Ball against Campbell's competition, and is held to be not so injurious to the public as to render it against public policy. If Campbell agrees not to engage in the retail shoe trade in the state of Ohio, this would be obviously a greater restraint than is reasonably necessary and would be illegal. If he agrees not to engage in the retail shoe trade in the county in which Dayton is situated, this might be reasonable or unreasonable, according to circumstances. Some states hold any restraint which includes the whole of the state to be unreasonable, but this is contrary to modern tendencies.

2. The maker of guns and heavy ordnance of which governments were the chief purchasers sold his business and agreed that for twenty-five years he would not engage in a like business anywhere in the world. It was held by the English court that this restraint was reasonably necessary to protect the purchaser, since a manufactory of such guns anywhere in the world would be a competitor.

3. If the business is one carried on under a public franchise or permit (as a franchise to lay gas pipes in public streets), or if it is impressed with a public trust or interest (as the business of a common carrier like a railroad which must serve all members of the public on equal terms), the courts may hold even a local restraint unreasonable, not as to the promisee but as to the public whom the parties are bound to serve.

4. Agreements to combine for the purpose of lessening competition, limiting the output, regulating prices, dividing the territory in which business shall be done, and the like, are illegal because detrimental to the public welfare.

28. Effect of illegality upon contracts in which it exists. In determining the effect of illegality upon a contract in which it exists it is necessary to determine whether the contract can be divided into parts, and, if divisible, whether the legal part may be separated from the illegal portion.

1. If a contract is indivisible, that is, if it has one indivisible promise or act on one side and one single promise on the other, the whole contract must fail if one of these promises is illegal.

Example 1. Nagle agreed to work for Wiley for a specified sum per month, and among other services to assist in the bootlegging business. Nagle performed various services, including the driving of an automobile in bootlegging work for Wiley. Nagle cannot recover the agreed price for his services, because Nagle's promise to perform the services is an indivisible one and is tainted with illegality. He cannot recover for the legal services, that is, those not connected with the bootlegging, because the promise of Wiley is not to pay a particular sum for the lawful work and another sum for the unlawful work, and the promises and acts of Nagle are also incapable of separation. The whole contract must therefore be regarded as illegal and unenforceable.

2. If the contract is divisible, that is, if there are two or more promises on one side and a separate consideration for each on the other side, and if the legal may be separated from the illegal, the legal portion may be enforced unless the illegal part is so immoral or criminal that the court thinks it best to give the parties no relief.

Example 2. Patten sells his retail business to Gibbs for $10,000, and in consideration of $1000 more Patten agrees not to engage in a similar business again anywhere in the state. The second agreement is illegal as an unnecessary restraint of trade, but it rests upon a separate consideration and can therefore be separated from the legal part, and the latter may be enforced.

3. Ordinarily the law gives no relief to either party to an illegal contract, either by enforcing the contract or by allowing a party to it to recover anything paid or advanced under it. But it may

aid a party to get back what he has paid, provided he is, as compared with the other party, innocent of an illegal intent, or provided his recovery of the money would prevent the illegal transaction from being carried out. Statutes often provide that money paid on a gambling contract may be recovered.

Examples. 3. A marriage broker induces an ignorant immigrant to pay him money to secure her a husband. The court thinks the parties are not in equal guilt, since the woman is ignorant and is played upon by the superior ability of the broker, and permits her to recover the money.

4. Underwood pays Barker a sum of money to commit an assault on Wood. To allow Underwood to recover this before the assault is committed would remove the inducement for Barker to commit the assault. Such recovery is not out of consideration for Underwood but out of consideration for Wood and the public peace.

VI. Reality of Consent

Agreement consists in the meeting of the minds of the parties. But if one mind or both give consent by mistake, or if one is misled by misrepresentation or fraud, or if one is compelled by duress or undue influence, there may be no true agreement. In such cases the contract may be avoided by the party misled. We have then to consider the effect of mistake, fraud, duress, and undue influence.

29. Mistake. Mistake about some material fact connected with the contract may be mutual, that is, common to both parties, or unilateral, that is, made by one party alone. (1) The fact about which a mutual mistake occurs may be as to the subject matter of the contract, namely, (*a*) the existence of the subject matter, (*b*) the identity of the subject matter, or (*c*) the quality of the subject matter. (2) Unilateral mistake may be (*a*) unknown to the other party, (*b*) known to the other party, (*c*) a mistake as to the identity of a party, or (*d*) a mistake as to the nature of the transaction itself.

1. *a.* Mutual mistake as to the existence of the subject matter of the contract really prevents a contract from being formed at all.

Examples. 1. Clark sells Snyder a horse. Unknown to either party the horse had died before the contract was made. There is no contract, because there is no subject matter upon which the minds of the parties could meet.

2. A cargo is at sea. The owner sells it subject to the risk of its being already lost. The buyer is bound although the cargo was lost when the contract was made, because the buyer assumes the risk. There is no mistake, because that risk is a part of the subject matter of the contract. If the owner knew it was lost, the contract can be avoided for fraudulent concealment.

b. Mutual mistake as to the identity of the subject matter enables either party to avoid the contract.

Example 3. Reuter says, "I have purchased Howe's horse, Billy, and will sell him to you for $250." Gross replies, "I will take him at that price." Howe had two horses named Billy. Reuter knew only the one he bought and Gross knew only of the other. There is no binding contract. The minds have not met upon the same subject matter.

c. Mutual mistake as to the quality of an article will not ordinarily affect the validity of a contract.

Example 4. Curry finds a stone which appears to be a jewel of some kind, and thinks it is a topaz. Brand, equally uncertain as to its quality or value, buys it for a small sum. It turns out to be an uncut diamond of great value. The contract is binding. Neither party knew the true nature of the stone, and each had an equal opportunity to ascertain it.

2. *a*. Unilateral mistake unknown to the other party is not ordinarily a ground for avoiding a contract.

Example 5. Curry sells the stone (as above), believing it to be a topaz. Brand knows it is a diamond but is ignorant of Curry's belief. The contract is binding. Curry alone is mistaken and Brand has neither caused Curry's mistake nor taken fraudulent advantage of it.

b. Unilateral mistake known to the other party and taken advantage of by him may enable the mistaken party to avoid the contract. But this doctrine has rather narrow limits. If the opportunity of knowledge is equally open to both parties, one is not bound to reveal to the other what he has by greater care discovered.

Examples. 6. Allen buys of Saunders the negotiable promissory note of Langdell. Allen believes Langdell to be solvent, that is, that Langdell is able to pay his debts. Saunders has just learned of Langdell's insolvency and knows that Allen has not yet learned of it or had a reasonable opportunity to learn of it. Allen may avoid the contract. Saunders's fraudulent concealment is fatal.

7. Hall sells his land to Whittier. There is a valuable mine in it. Hall does not know this. Whittier does know it and knows that Hall is ignorant of it. The contract is binding. Whittier is not bound to disclose what Hall has had an equal opportunity to discover, but Whittier must not by any word or trick mislead Hall.

8. Gill sells cotton to Brett, the price being dependent upon whether the war between the United States and Germany is ended. Gill asks Brett whether there is any news of peace. Brett, knowing that peace has been declared, says there is no news. He thereby confirms Gill's mistake and Gill may avoid the contract.

c. Unilateral mistake as to the identity of the other party will avoid a contract.

Example 9. Davis has been accustomed to deal with Eppinger. Unknown to Davis, Eppinger has sold his business to Pico. Davis sends an order for goods to Eppinger. Pico gets the order and ships the goods. Davis is not bound. He has a right to select whom he will deal with, and is not obliged to have another person than Eppinger introduced into the contract.

d. Unilateral mistake as to the nature of the contract may avoid it.

Examples. 10. Carmack is induced by a trick of Dunn to sign a negotiable note, thinking he is signing a contract to sell goods for Dunn. Carmack is not bound.

11. As above. Dunn indorses the note to Hughes, who pays value for it in ignorance of Dunn's fraud. Carmack is not liable to Hughes unless Hughes shows that Carmack's carelessness in signing the note is so great as to make it just that he should suffer rather than Hughes. When the rights of an innocent third party are in question, Carmack may be estopped or prevented by law from setting up the mistake and the fraud. Whether Carmack's carelessness is so great as to work such an estoppel is a question of fact.

30. Fraud and misrepresentation. Fraud consists in a false representation of fact, made with knowledge of its falsity (or with reckless disregard of its truth or falsity), with the intention that it should be acted upon by another, and actually causing that other to act upon it to his damage. Fraud by one party enables the other party to a contract to cancel it. Fraud is also a tort and is called deceit in the law of torts.

Example 1. A seller of a horse represents him to be sound and healthy when, known to the seller and unknown to the buyer, he has the glanders. The buyer acts upon the statement, buys the horse, and afterward discovers that it is diseased. The buyer may either (1) rescind the contract, that is, return the horse and recover the purchase money, or (2) keep the horse and recover money damages in an action in tort for deceit.

If in the above case the seller actually believes the horse to be sound when he makes the statement, there is no fraud, but merely innocent misrepresentation. In such case there can be no action for deceit, since in order to bring an action for deceit it is necessary either to show that the seller knew that what he said was false or to show that he knew that he did not know whether it was true or false, that is, made the statement without any belief and in reckless disregard of its truth or falsity. At common law a contract would not be set aside for innocent misrepresentation, and this is probably the generally accepted rule, although the equity courts often set contracts aside upon this ground.

Representations of fact relating to the character or identity of goods, or their age, title, or quality, made by the seller to the buyer, are called warranties, and an action lies for the breach of them (see section 53 *post*).

Example 2. The seller of a horse says, "I warrant him to be sound and healthy." Unknown to either party, the horse has a spavin. The buyer has an action against the seller for a breach of warranty, or may return the horse and recover his money. If the seller knew the horse had a spavin, the buyer could, at his election, sue for breach of warranty, or sue in tort for deceit, or rescind the contract and recover the purchase money.

If the misrepresentation is as to a matter of opinion rather than of fact, or is mere dealer's talk, or "puffing," there is no actionable fraud, because the injured party has no right to rely upon it.

Examples. 3. The seller of a dog says, "This animal will fill the bill." This statement is one of opinion only and not of fact. The buyer cannot rely upon it.

4. The seller of a motor-cycle says, "This is the greatest bargain I have offered in months." The remark is a "puff" and of no legal effect.

In some cases where the defect is not discoverable upon examination, and is a serious one, the seller may be under a duty to disclose

it to the buyer. The general rule, however, is *caveat emptor*, "let the buyer beware." But in no case must the seller resort to trick or concealment to cover up a defect.

Example 5. Taylor sells Gould a mahogany log too large to be rolled over easily, and conceals a defect by rolling the defective part next the ground. This is a trick of artful concealment for which the buyer may cancel the contract.

31. Duress. Duress consists in actual or threatened violence or imprisonment whereby the contracting party is compelled to do something he does not want to do. Such threatened violence or imprisonment may be directed against one's self or against a member of one's family. Whatever threat overcomes the will of the contracting party and compels him to do what he otherwise would not do may in general be regarded as duress.

Example. Phillips's son has been in Hoffman's employment and is charged with stealing money. Hoffman threatens to have the son arrested and prosecuted unless Phillips pays or secures to Hoffman the sum alleged to have been taken. Phillips gives Hoffman his note for the amount. This note may be avoided upon the ground that it was given under duress, that is, under the fear occasioned by Hoffman's threat to imprison Phillips's son.

32. Undue influence. Undue influence consists in an improper use of power over the mind of another, whereby that other is caused to make contracts or gifts which he otherwise would not make. It is a mild or indirect form of duress whereby a person of superior intellect and will dominates one of inferior capacity or experience.

Example. A stepfather manages the property of his infant stepchildren. As each one becomes of age the stepfather buys the property or interest, takes a conveyance, and pays less than the property is worth. The conveyances so obtained may be set aside, since the influence of the parent or guardian is presumed to continue for some time after the child or ward reaches his majority, and the contract is made under such undue influence as is unfair.

In some cases, as parent and child, or attorney and client, the law presumes that the parent or attorney exercised undue influence, and the burden is on the parent or attorney to show that

there was in fact no undue influence. In cases where there is no confidential relationship existing between the parties, the burden is upon the one who seeks to set aside a transaction to show that undue influence was in fact exerted.

HOW TO MAKE A CONTRACT

The object in drawing up a contract should be to embody the exact agreement of the parties in such a manner that no future misunderstandings as to its terms shall arise. There is a rule of law that when a contract is reduced to writing, the terms of the written instrument cannot be contradicted or varied by oral evidence. While there are some exceptions to this rule, which it is not necessary to mention here, the rule is very general in its application and should be borne in mind when the contract is written and executed. A very good way is for each party to put in one-two-three order the promises he is ready to make, and for the other party to see whether these are the promises he is willing to accept. When these oral promises are embodied in the written instrument, the whole should be carefully considered again in order to make sure that each party has given and obtained just what he intends. It is very unwise to leave anything to an outside oral agreement.

A general form of a contract is here given. The particulars may be varied according to the actual agreement.

"This Agreement, made in duplicate this fifth day of April, one thousand nine hundred and ——, by and between Alfred Black, of the city of Chicago, in the state of Illinois, of the first part, and William Coles, of the same city and state, of the second part,

"Witnesseth, that the said party of the first part, for and in consideration of the agreement hereinafter contained, to be performed by the party of the second part, agrees to and with said party to construct and finish in a good, substantial, and workmanlike manner on the lot belonging to the party of the second part, and known as No. 2121 Cottage Grove Avenue in the city of Chicago, Illinois, one frame building in accordance with the plans and specifications hereto annexed, of good, substantial materials, on or before the fifteenth day of November next. And the party of the second part, in consideration thereof, agrees to pay to the said party of the first part for the same the sum of twenty-five thousand dollars, lawful money of the United States, as follows: the sum of five thousand dollars when the foundations are completed; the sum of five thousand dollars when the frame or superstructure is inclosed; the sum of five thousand dollars when the structure is plastered; and the balance of ten thousand dollars when the building is fully completed according to the plans and specifications.

"And the party of the first part further agrees that in case of his failure to complete the work by the date fixed he will pay to the party of the second part as liquidated damages, and not as a penalty, ten dollars for each and every day the full completion of his contract is delayed beyond that date.

"IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands the day and year first above mentioned.

ALFRED BLACK
WILLIAM COLES"

If the signatures are to be witnessed, add at the left "Signed in the presence of," and have the witness write his name beneath these words. If there is a witness, he must be produced in court in order to prove the signatures, or his absence must be satisfactorily accounted for. If there is no witness, then other evidence, as the testimony of the other party, the proof of handwriting, etc., may be used in order to prove the signature in question. If a seal is used, the final clause should read, "In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written" (see section 24 *ante* as to the effect of a seal).

If the signature of a party is to be affixed by his agent, the form should be "John Doe, by Andrew Bright, his agent." The use of the word "by" is very important. The signature "John Doe, Andrew Bright, Agent," might make Bright a party (see section 146 *post*).

If someone (James Dugan) is to guarantee the performance by the party of the first part above, and if the guaranty is given at the time the contract is made, there may be written below the signatures the following:

"In consideration of the agreement above made by the party of the second part, I do hereby guarantee to the said party that the above-named Alfred Black will well and faithfully perform everything by the foregoing agreement on his part to be performed, at the times and in the manner above provided.

JAMES DUGAN"

If the guaranty is made subsequent to the contract to be guaranteed, it will require a new consideration, and this should be expressed in the written guaranty—for example, "In consideration of one dollar to me paid by William Coles, the receipt whereof is hereby acknowledged, I do hereby guarantee, etc." (section 103 *post*).

A simpler form of contract would be as follows:

"James Dugan and Charles Denman do hereby mutually agree as follows: James Dugan to (state what James Dugan promises); Charles Denman to (state what Charles Denman promises).

Chilton, Ohio, January 6, 19—.

JAMES DUGAN
CHARLES DENMAN"

But the more formal language is safer to use in order to make clear that the promises depend upon each other and are indivisible (see section 40 *post*).

A contract may be assigned in the following form:

"For value received, I hereby assign to Elmer Ferris the within contract.

Sacramento, California, June 19, 19—. JAMES DUGAN"

REVIEW QUESTIONS AND PROBLEMS

10. Define "contract." Distinguish agreement from contract. Illustrate. Distinguish affirmative and negative contracts. How many parties to a contract are there? What is a novation? Illustrate.

Problem 1. Holderman, in a spirit of frolic and fun, offers Keller $300 for a watch worth $15. Keller, in the same spirit, accepts, takes Holderman's check for $300 on a bank in which he has no deposit, and delivers the watch to Holderman. Keller presents the check, and, when it is dishonored, brings an action against Holderman for the $300. Holderman sets up the above facts and offers to return the watch. Should Keller recover the $300 against Holderman?

11. Name the essentials of an enforceable contract.

12. What is the meaning of "agreement"? How is it determined when an agreement has been reached? Why must its terms be definite?

Problem 2. Daggett offers to sell his horse to Rupley for $165. Rupley understands Daggett to say $65, and replies, "I'll give fifty-five." Daggett understands that Rupley means "one fifty-five," having dropped the "one," as is not unusual among traders. Daggett replies, "Sixty-five is the price." Rupley then says, "I'll take him." Is there a contract?

Problem 3. Sherman agrees to give his niece Koons 100 acres of land if she will live with him until her marriage and act as his housekeeper. Koons accepts and performs her part of the agreement. Sherman refuses to convey to her any land. Koons sues for breach of the contract. Is there an enforceable contract? Has Koons any remedy?

Problem 4. A township hires O'Neal and agrees to pay him "good wages," but afterward refuses to give him any work. O'Neal sues for damages for breach of contract. Result?

13. Name three classes of agreements. Illustrate. Point out the different classes in section 10, Ex. 6.

14. How do agreements arise? Define offer. Define acceptance. What forms do offer and acceptance take? Explain bilateral executory contract; unilateral executory contract; executed contract. Define express promise; implied promise.

1. Must the offer be communicated? To whom? When is the offer of a reward published in a newspaper communicated? When one purchases a railway ticket, who makes the offer?

Problem 5. Blossom is on a train and Dod's agent comes through to take orders for the delivery of baggage. Blossom gives the agent a check for his trunk and receives a receipt containing a notice that Dod will not be liable in case of loss to an amount exceeding $100. Blossom does not read the receipt or know of its contents. The baggage is lost. Is Blossom limited to a recovery of $100?

2. How may the acceptance be communicated? Are words necessary? Must it actually reach the offeror? Is mental acceptance sufficient? When an offer is made by mail, when is the acceptance complete?

Problem 6. Corlies asked White for an estimate of the cost of fitting up an office. White made the estimate (not an offer). Corlies then wrote White saying that if White would do the work within two weeks, he might begin at once. No answer was received. The next day Corlies canceled the order. Meanwhile White purchased material and began to work upon it at his shop. White now sues Corlies for breach of contract. Was there a completed contract?

Problem 7. Hobbs has supplied The Massasoit Whip Co. with eelskins used in its business. He has sent them without a specific order, and The Massasoit Whip Co. has kept them and paid for them. Hobbs sends The Massasoit Whip Co. a quantity on April 2. The Massasoit Whip Co. keeps them for some months unpacked. They are then destroyed by fire. Is The Massasoit Whip Co. liable to Hobbs for the price?

3. What is the effect of a qualified acceptance? Illustrate.

Problem 8. Shipman offers Waite 2000 tons of iron rails at so much per ton. Waite telegraphs, "Send me 1200 tons iron rails as per offer." Shipman telegraphs a refusal to fill the order. Waite then telegraphs, "Send me 2000 tons iron rails as per offer." Shipman again refuses to fill the order. Waite then sues Shipman for breach of contract. Result?

4. What control has the offeror over the offer before acceptance? Same question (1) when offer is made under seal and (2) when offeree pays to have time to accept?

Problem 9. Fisher is offering goods at auction. Seltzer bids $100 for the lot, but retracts the bid before the hammer falls. Fisher refuses to accept the recall of the bid and knocks down the goods to Seltzer, who refuses to take them. Fisher sues Seltzer. Is there a contract?

Problem 10. Kershaw sent a letter to Moulton saying: "We are able to offer salt at 85 cents a barrel. Shall be pleased to receive orders." Moulton at once ordered 2000 barrels at that price. Kershaw refused to fill the

order, as salt had gone up in price. Moulton sues Kershaw for breach of contract. Result and reasons?

5. Suppose that offeree accepts after the offeror has revoked but before the offeree knows of the revocation?

6. How does an offer lapse? What is the effect, upon an unaccepted offer, of the death of the offeror or of the offeree?

15. Who is an infant? When is he of age? Which of his contracts are binding during infancy? Which are binding after he is of age? What are necessaries? What is ratification?

Problem 11. On August 10, at 8 A.M., Broughton bought of Clarke a bicycle for $50. Broughton's twenty-first birthday was on August 11, and it was proved that he was born at 10 P.M. of that day. Clarke sues Broughton for the agreed price. Broughton seeks to disaffirm the contract and pleads that it was made during infancy. Result?

Problem 12. Lee, a student of eighteen years, engaged a room of Gregory for forty weeks, at $5 a week, payable weekly. At the end of ten weeks he left the room, and Gregory was unable to secure another lodger. Gregory sues Lee for $200. Lee pleads infancy. How much may Gregory recover?

Problem 13. Lay, while an infant, bought jewelry (not necessary) of Thompson. After Lay became of age he acknowledged the debt and said he would pay it as soon as he had the means. Is Lay liable to Thompson?

Problem 14. Simmons, an infant, buys a car of Chandler. After Simmons is twenty-one he sells the car to Wartle. Chandler sues Simmons for the price of the car. Can Simmons succeed?

Problem 15. Towle, an infant, sells Dresser a horse. Before Towle is twenty-one he brings an action to recover the horse from Dresser. Will such an action lie during Towle's minority?

16. What contracts of an insane person are voidable? What are binding? Same questions as to idiots; intoxicated persons.

17. What was the common-law rule as to married women's contracts? What is a *void* contract? (Are an infant's contracts void?) How do statutes change the common law as to married women's contracts?

19. What contracts require a consideration? What instruments have presumptive consideration? What is the effect of a seal at common law?

Problem 16. Cook voluntarily supplied necessary articles to Bradley's father, who was old and poor. Bradley afterward promised Cook to pay for them. Cook now sues Bradley on that promise. Is Bradley liable?

20. Must the consideration equal the promise in value? What is a valuable consideration? What is not?

Problem 17. Shaw says to Devecmon, "If you will take a trip abroad I will pay your expenses." Devecmon takes the trip, and now sues Shaw for the expense incurred. Is Shaw liable?

Problem 18. Blake writes to Cole, "If you will extend the time which Allen has to pay you his debt, I will become surety for Allen's payment." Cole extends the time and takes from Allen a new note on three months' time. Allen does not pay. Cole sues Blake. Should Cole succeed?

Problem 19. Cook and Russell were in dispute about a claim made by Russell upon Cook for an injury to goods which Cook was carrying for Russell. Cook finally agreed to give and Russell to take one half the amount Russell first claimed. Russell sues on Cook's promise. Cook answers that there was no consideration for his promise because he (Cook) was not liable at all to Russell for the injury to the goods.

Problem 20. Smith was a constable in Troy. Whildin offered a reward of $100 for the arrest of Wingate for a specified crime. Smith, knowing of the reward, arrested Wingate in Troy, and now brings an action for the reward. What objection?

21. What is meant by a past consideration? Distinguish from an executed consideration. Illustrate. Effect of previous request? What is meant by waiving a legal bar to an action on a contract?

Problem 21. Hicks says to Burhans, "If you will look up certain of my debtors, I will pay you what is right." Burhans does so. Hicks then promises to pay Burhans $100. How much may Burhans recover?

22. What is meant by an illegal consideration? Illustrate.

23. What is the Statute of Frauds? Object? When first enacted? What sections deal with contracts? State the provisions of the fourth section. Of what may the memorandum consist? What must it contain? State the provisions of the seventeenth section. In what three ways may this section be satisfied? Is the seventeenth section in force in your state? If so, what contracts for personalty are within the statute?

Problem 22. A memorandum of sale made by an auctioneer read as follows:

"October 9, 1925. This day sold H. B. Leeman's house and land on Bartlett Street in Lewiston; was struck down to O'Donnell for $12,000, one third down. DOUGLAS ELTON, Auctioneer"

O'Donnell sues Leeman, alleging that he (O'Donnell) was to pay one third down, one third in one year, and one third in two years, and that Leeman refused to carry out the contract. Leeman pleads the Statute of Frauds. Is this a good defense?

Problem 23. Graham sells Hirth by parol two standing trees for $10, later to be cut down and removed by Hirth. Afterward Graham refuses to

allow Hirth to cut the trees. Hirth sues Graham for breach of contract. Graham pleads the Statute of Frauds. Result?

Problem 24. The Texas Railway and Warner agree orally that if Warner will grade and lay a sidetrack, or switch, the railway will maintain the switch for Warner's benefit for shipping purposes as long as Warner may need it. Warner does his part. The Texas Railway refuses to perform its part. Warner brings an action for damages. The railway pleads the Statute of Frauds. Which provision? Result?

24. What is a seal? What is a sealed contract? What is the effect of a seal? What statutory changes in the effect of a seal have been made?

25. What contracts are usually declared by statute to be illegal? What is the effect of prohibiting an act? What is the effect of affixing a penalty to the doing of an act?

Problem 25. A statute prohibits any work, labor, or business on Sunday. Handy agrees with Paul to procure advertisements to be published in Paul's Sunday newspaper. Is this contract illegal?

Problem 26. Under a similar statute Stevenson makes and delivers a promissory note to Reynolds on Sunday. May Reynolds enforce the note?

26. Define wagering contracts. Were they illegal at common law? Explain wagers on the rise and fall of the market. In what sense are insurance contracts wagering contracts?

Problem 27. Mohr, a broker, sues Miesen, a customer, for moneys paid and expended by Mohr in certain stock transactions. It was understood between Mohr and Miesen that the purchases and sales made by Mohr for Miesen should not result in an actual transfer of stocks, but that in each case the contract should be adjusted by the payment of money by Miesen in case the transaction proved to be a losing one, or to Miesen in case it was a winning one. Mohr paid out for Miesen more than he took in for him. Can Mohr recover this amount?

27. Name and illustrate contracts illegal at common law. What is a contract in restraint of trade? Are all such contracts illegal? What is the test?

Problem 28. Child had a claim against the United States. Trist agreed with Child to secure an act of Congress appropriating money for the payment of the claim, and Child agreed to pay Trist 25 per cent of whatever sum Congress might appropriate. Trist secured an appropriation in favor of Child for $12,000. Child refuses to pay Trist, who then brings an action against him for $3000. Result?

Problem 29. Partridge charges Hood with stealing money. Upon Partridge's agreeing not to prosecute Hood criminally the latter gives Partridge a promissory note for the amount. Is Hood liable upon the note?

28. What is an indivisible contract? What is the effect if any portion of it is illegal? What is a divisible contract? What is the effect if one part is illegal? If a party pays money upon an illegal contract, can he recover it?

Problem 30. Bernard deposited $500 with Taylor as a wager on a foot race, knowing it was to be a sham, or "fake," race, and intending to cheat someone. Before the race was run, Bernard became suspicious that he would be cheated and demanded back his money. Taylor refused to give it back, and finally paid it to Arcoss, the pretended winner of the race. Bernard sues Taylor for the amount. Result?

29. What is meant by reality of consent? What will prevent reality of consent? Distinguish between mutual and unilateral mistake. Name the classes of mutual mistake. Explain and illustrate each. Which will avoid a contract? When will unilateral mistakes avoid a contract?

Problem 31. Contract of sale of a lot of land on Prospect Street in Waltham. In an action against the buyer for the price, he sets up that the land now tendered him is on another Prospect Street than the one he had in mind, and understood that the seller had in mind, when the contract was made. Is this a good defense?

Problem 32. Illinois Central Railway prepares a rate sheet and by mistake prints the fare from Allenville to Dansburg as $21.25 when it should be $36.70. Ellis discovers the mistake and takes advantage of it by at once purchasing of a local agent a large number of tickets at the printed price. The railway seeks to enjoin Ellis from disposing of these tickets and to compel him to return them and receive back his money. Result?

30. Define fraud and its effect upon the contract. Distinguish innocent misrepresentation. Is this a tort? Will it avoid a contract? When does a representation become warranty? What is the effect of a representation of opinion? What is the effect of a puff? What is fraudulent concealment?

Problem 33. Brightmyer had engaged Boomhour to teach school in a district school in case she secured a certificate by a certain time. Campfer applied for the same school, and on being informed of the contract with Boomhour, stated to Brightmyer that there would be no examination for teachers in time for the opening of school. Brightmyer then engaged Campfer. Later Boomhour appeared with the necessary certificate, and Brightmyer refused to allow Campfer to teach. Campfer sues Brightmyer for breach of contract. (1) In case Campfer knew there would be an examination, can he recover? (2) In case Campfer believed there would not be an examination, can he recover?

Problem 34. Grigsby sold Stapleton cattle, knowing and concealing the fact that they had Texas fever, a disease not discoverable by examination. The cattle died, and Grigsby sues for the price. Should he win the suit?

31. Define duress. Need it be against the contracting party?

32. What is undue influence? Distinguish from duress. When is it presumed?

Draw a contract by which you agree to work for John Dean as clerk in his store for one year, with a vacation of two weeks, for $30 a week payable weekly during the entire year, and are to have at cost price such goods, not exceeding $100 in the total, as you may choose to select from his stock.

Draw a contract by which Richard Rice guarantees the faithful performance of your part of the above contract.

Draw an assignment of your right to the goods.

CHAPTER III

OPERATION AND DISCHARGE OF CONTRACTS

I. Liabilities and Rights of Third Parties

33. Liability of third parties. The problem here is twofold: first, whether anyone can be made liable upon a contract who is not a party to it; and, second, whether one may be liable for interfering with the formation or performance of contracts.

1. Contracts bind only the parties to them. A party is one of the makers of the contract, as distinguished from outsiders who make no agreements. A person cannot be made liable upon a contract to which he was not a party, for agreement lies at the basis of all true contracts. But an undisclosed principal may be liable on a contract made by his agent, although by its terms it is a contract between the agent and the other party; this is an exception to the general rule and is treated later (see section 144).

Examples. 1. Ryan contracts with Pullen. In fact, Ryan is acting for an undisclosed principal, Naylor. When Pullen learns this, he may hold Naylor liable on the contract.

2. But if Ryan, as above, exceeds the authority Naylor gave him, Pullen cannot hold Naylor. It is really Naylor's consent that Ryan may make the contract that renders Naylor liable.

2. Third persons (that is, strangers to the contract) may make themselves liable for damages in tort by interfering with contracts, by causing one party to a contract to commit a breach of it, or by using unlawful means to prevent a person from making a contract. A boycott is brought about by inducing persons not to deal with the one boycotted. If force or fraud is used, the boycott becomes unlawful, and if the boycott is a so-called secondary boycott (as, for example, where union men attempt to induce persons hav-

ing no grievance against the employer to have no dealings with him) the boycott is unlawful, in a majority of states, no matter what means are used.

Examples. 3. Hooper engages Horan to sing at his theater for the season. Sage induces Horan to break this contract and sing at Sage's theater. Sage is liable to Hooper for the damages caused by Horan's breach of contract.

4. Pike is negotiating with Robinson to sing at his theater. Gwin falsely tells Robinson that Pike is insolvent and cannot pay the salary. Robinson refuses to contract. Gwin is liable in tort to Pike for inducing Robinson, by false representations, not to enter into a contract with Pike.

5. Strikers threaten to assault workmen who are seeking their places, and thus prevent the employer from getting new workmen. The strikers are liable to the employer for preventing him by unlawful means (threats of violence) from making contracts with those who otherwise would apply. The strikers may also be prohibited by court order from using unlawful means for this purpose. If the strikers also combine to keep customers away, there is in most states an unlawful boycott of the employer's business.

34. Rights of third parties. In a large majority of the states, if a contract is made by A with B for the direct benefit of C, the latter may recover upon it, although A furnished the consideration and the promise of B was made to A. This is especially so whenever A owes C some duty which he is seeking to discharge by giving C the benefit of B's promise. So also an undisclosed principal may sue upon a contract made by his agent in his behalf (see section 144 *post*).

Examples. 1. Moon lends Grant money and Grant promises Moon to repay it to Penny, to whom Moon owes money. Penny may maintain an action against Grant upon the promise made for his benefit.

2. A partner coming into a business promises a partner going out that the former will assume and pay the latter's obligations to the partnership creditors. The creditors may sue the incoming partner upon the promise made for their benefit.

3. A father agrees to name his child after Hale, in consideration of Hale's promise to pay the child $1000 when he is twenty-one. The father names the child after Hale. When the child is twenty-one he may compel Hale to pay him the money so promised.

4. Ferris contracts with Adams, but is secretly acting for Gould, an undisclosed principal. Gould may hold Adams upon the contract.

II. Assignment of Contracts

35. Assignment by act of the parties. A bilateral contract creates both duties and rights. The problem is whether either the duties or the rights may be assigned by a party to the contract to some other person.

1. *Assignment of duties.* A party to a contract cannot assign or transfer his duties under it. The other party has a right to look to the person with whom he has contracted. If the duties are not for purely personal service or do not involve personal confidence, one can assign his rights and delegate to another the performance of his duties, but will remain liable if the duties are not properly performed.

Example 1. Whitcomb let a carriage to Babcock at a yearly rental for five years, and agreed to keep it in repair and to paint it every year. Whitcomb sold his business to Wilbur and notified Babcock that Wilbur would take care of future repairs. Babcock refused to accept Wilbur as a substitute for Whitcomb and returned the carriage. Babcock is right. He is not bound to look to anybody except Whitcomb for the repairs. But nevertheless Whitcomb could employ Wilbur to do the necessary work, remaining himself personally liable for any carelessness or failure to do the work. If the work is artistic work, the performance of it cannot be passed on to another; the other party has a right to the artistic skill of the person with whom he contracted.

2. *Assignment of rights.* The rights that one acquires under a contract may be assigned if they relate to money or property, but one cannot assign a right to some personal service. The person transferring or selling to another his rights under a contract is called the assignor, and the one receiving such rights is called the assignee. In the early law if the assignee sought to enforce the contract in the courts, he must sue in the name of the assignor, but statutes now generally give the assignee the right to sue in his own name. The assignee is subject to whatever defenses might have been set up against his assignor; he gets the assignor's rights, and no more.

Examples. 2. Owings contracts to give Rogers $100 for Rogers's adding-machine. Owings assigns the contract to McClay. Upon tender of the $100 McClay is entitled to the machine. So also Rogers could assign the right to receive the money.

3. Gaiser contracts to give Rohmer his note for $100 for Rohmer's dog. Gaiser assigns the contract to Denison. Rohmer is not bound to take Denison's note, nor is he bound to deliver the dog to Denison unless the latter tenders Gaiser's note.

4. Dever agrees to work for Howard in Howard's store for $30 a month. Howard sells the store to Jenkins and assigns to him the contract with Dever for services. Dever is not obliged to work for Jenkins under the contract.

5. Eaton assigns to Morgan a contract with Allen by which Allen agreed to deliver 100 bushels of oats in exchange for Eaton's horse. Morgan sues Allen for breach in refusing to deliver the oats after receiving the horse. Allen sets up that Eaton fraudulently represented the horse to be sound and claims an offset in damages. Morgan is subject to this defense precisely as Eaton would have been.

36. Negotiability of certain contracts. Contracts contained in written instruments that are negotiable, such as bills of exchange, promissory notes, and checks, may be transferred by negotiation from hand to hand so that each new holder may recover upon them (see section 111 *post* for definition of "negotiable instrument"). Moreover, the transferee, if a holder for value and without notice, is not subject to the personal defenses which might have been set up against the transferor. This incident of negotiability is a peculiar quality of these instruments and will be more fully discussed under the head of "Negotiable Paper."

The distinction between assignability and negotiability may be thus illustrated.

1. "On demand I promise to deliver to John Doe 100 bushels of wheat at 80 cents a bushel. RICHARD ROE."

Indorsed: "For value received, I hereby assign this contract to J. S. Dale. JOHN DOE."

2. "On demand I promise to pay to the order of John Doe $100, value received. RICHARD ROE."

Indorsed: "Pay to J. S. Dale. JOHN DOE."

The first instrument is a contract. It is assigned by the promisee, John Doe, to J. S. Dale. The assignee, Dale, may maintain an action against the promisor, Richard Roe, in case the latter refuses to deliver the wheat upon offer of the price. In the early law Dale would have to sue in the name of the assignor, Doe, and

he would be subject to whatever defenses might have been set up had Doe brought the action himself, as, for example, that there was mistake or fraud in the contract. He may now generally, under state statutes, sue in his own name, but he is still subject to the same defenses.

The second instrument is a negotiable promissory note. It is indorsed by the promisee, John Doe, to J. S. Dale. The indorsee, Dale, may maintain an action in his own name against the maker, Richard Roe, in case the latter fails to pay when the note is due; and if Dale paid for the note and had no notice of any defense, like mistake or fraud, he will not be subject to such defense even though Doe would have been subject to it if he had retained the note and brought the action.

The rules of negotiability came into the law from the custom of merchants and are peculiar to a class of instruments known as negotiable paper.

37. Assignment by operation of law. Where a party who has made a contract dies, most contracts which he might have assigned during his life pass to his executor or administrator, who may sue or be sued upon them. Contracts for personal services do not survive the death of either party, and contracts requiring long-continued work or conduct of business by an administrator will not be deemed to survive.

So where a person becomes a bankrupt, his right to enforce contract obligations passes to his trustee in bankruptcy; but the trustee would not be bound to enter upon performance, if such conduct would prevent the speedy winding up of the bankrupt's affairs.

At common law a man, upon marrying, became entitled to all his wife's personal property and could enforce her claims growing out of contract. He also became liable for the debts contracted by her before marriage. But these common-law rules have been almost everywhere swept away by statutes giving married women the control of their own property and making them liable for their own contracts.

III. Discharge of Contracts

38. Discharge by agreement, including performance. An agreement to discharge a contract may be made by the parties to it after it is created, or the agreement as to a method of discharge may be contained in the contract itself.

1. *Waiver or rescission.* When a bilateral contract has been made and is a binding agreement, the parties to it, by a new agreement, may contract to discharge it. The consideration is the release of A by B and of B by A from any further liability under it. If the contract has been performed by A but not by B, A may release B, but there must be some consideration for the release or it must be under seal; and in those states where the seal has no legal effect there must be consideration for the release in any event.

Examples. 1. Cleaver agrees to sell and Coleman to buy Cleaver's books for $1000. Cleaver and Coleman then mutually agree to release each other. Cleaver's promise to release Coleman is the consideration for Coleman's promise to release Cleaver, and Coleman's promise to release Cleaver is the consideration for Cleaver's promise to release Coleman.

2. Cleaver has delivered the books to Coleman, and Coleman now owes Cleaver $1000. Cleaver promises Coleman not to claim the $1000, that is, releases Coleman from liability. The promise is not enforceable; there is no consideration for it. Coleman gives Cleaver $900 and Cleaver releases Coleman from the balance. Still there is no consideration; a smaller sum is not consideration for a larger. Coleman gives Cleaver a 10-cent pencil in consideration of Cleaver's promise to release him; the promise is enforceable and Coleman is no longer liable to Cleaver. Cleaver gives Coleman a release under seal; it is enforceable and Coleman is released. A release under seal might be as follows: "For value received, I hereby release and discharge A. Coleman from all claims for the unpaid portion of the purchase price of his books. Witness my hand and seal this seventh day of February, 19—. Joseph Cleaver. [Seal]"

2. *Substituted contract.* The parties may by agreement substitute a new contract for an existing one.

Example 3. Corey agrees to dig a well for Powers for $50. Corey complains that he will lose money, owing to the presence of rock which had not been expected. It is agreed that Corey shall dig the well and that Powers shall pay him $75. This may be treated as a substituted contract and thus escape the difficulties mentioned in section 20, Ex. 4, *ante*.

3. *Provisions for discharge.* The contract itself may contain certain provisions looking to a discharge in specified events, as, for example, an agreement that either party may terminate it upon thirty days' notice. Insurance contracts or policies provide for a discharge in case of increase of risk, as in case that property remains vacant and unoccupied for more than ten days, and the like.

4. *Discharge by performance.* If in accordance with the terms of the contract either party performs what he has promised to perform, he is discharged. If both perform, the contract is discharged, or executed. Tender is an attempted performance; if it is accepted, it discharges the one making it; if it is refused, it discharges the one making tender, unless his contract is for the payment of money, and in that case he is still liable on his debt but may plead the tender in order to prevent a claim for interest or the costs of an action. A tender of money, to be good at law, must be of the exact amount due and in legal-tender money.

Legal-tender money in payment of private debts consists of any gold coin, silver dollars, United States notes (greenbacks), gold certificates, and United States Treasury notes, to any amount; fractional silver coins to the amount of ten dollars; nickel and copper coins to the amount of twenty-five cents. Silver certificates, Federal-Reserve notes, Federal-Reserve-Bank notes, and national-bank notes are not legal-tender money, but are ordinarily received in payment of debts without objection.

A tender of a check or promissory note of a debtor, or a check or note of a third person owned by the debtor, need not be accepted in place of money. If it is accepted, it is (in most states) regarded as merely a conditional payment unless otherwise expressly agreed. If the check or note is not paid, the creditor can either sue upon it or, by returning it, sue upon the original claim for which it was given. (See pages 159–160 *post* for further discussion of the kinds of money and legal tender.)

A contract of employment in which the time of service is not expressly agreed upon may be terminated by either party at any time without notice, notwithstanding the fact that the compensation was stated to be at a daily, weekly, monthly, or yearly rate. If a servant is employed for a definite period, as a week or a month, no notice of the termination of the employment is required from either master or servant.

Before a party to a contract can be said to have performed, he must have fully and exactly done what he promised. But in contracts for building or executing work with many specifications and details a breach that is slight and not willful may be overlooked on the doctrine of substantial performance. The contractor, while he may recover upon such substantial performance, must deduct from his recovery the amount the other party is damaged by the slight breach. A breach which is more than slight or unimportant, or which is intentional, will defeat a recovery on the contract, because it is not regarded as performance and the contractor is not therefore discharged from his obligation.

Example 4. Reilly agrees to build a house for Millis for $11,700. He has fully completed it according to specifications, except that there are some slight defects in the plastering. This is substantial performance, and Reilly may recover the contract price less an offset for the defect, which was in this case held to be $200. But if the departure from the contract was intentional or important, Reilly could not recover. One court says: "It may be harsh doctrine to hold that a man who has built a house shall have no pay for it, but the fault is with the one who voluntarily violates his contract."

If one agrees to perform to the satisfaction of another, and the matter is one of personal taste, he cannot recover until the other is satisfied. But if it is a matter which is not one of mere personal taste, and the work would be lost if it were not accepted, the other is bound to pay when he ought reasonably to be satisfied.

Examples. 5. Roth agrees to paint a picture of Schauf's wife to Schauf's satisfaction. Schauf is not pleased with it. He is not obliged to take it. Roth has not performed his contract.

6. Lent agrees to put in boilers in Cohen's factory to Cohen's satisfaction. Lent puts in the boilers. Cohen is not satisfied. But if a reasonable man would say Cohen should be satisfied, Lent has fulfilled his contract and Cohen is liable.

39. Discharge because of impossibility of performance. If it is impossible to perform a contract at the time the parties try to make the contract, no legally binding contract is created. Only in the accepted cases named below will subsequent impossibility discharge a contract.

1. *Prior impossibility.* If a physical or legal impossibility exists when the contract is supposed to be made, there is no contract, because the promise to do an impossible act is not a real consideration for the counter promise or act; for example, if at the time the parties try to sell a horse, unknown to them the horse has been killed, there is no contract because it is impossible to deliver the horse and a promise to deliver it is not consideration.

2. *Subsequent impossibility.* If an unexpected difficulty arises subsequent to the formation of the contract, it will not, save in the cases stated below, discharge the contract.

Example 1. Ely agrees to sell and deliver to Fesmeier a quantity of beans to be raised by Ely. Ely's crop is destroyed by frost. Ely is liable for a breach of contract, since, although he cannot deliver beans from his own land, he can procure them elsewhere, and there is not, therefore, a real impossibility. If, however, it had been specified that Ely was to deliver the beans grown in a particular field, and the crop in that field had been destroyed, there would have been an impossibility due to the destruction of the subject matter, and the seller would have been relieved from liability.

The following cases of impossibility arising subsequent to the formation of the contract will discharge the contract.

a. Legal impossibility. If the impossibility is created by a change in the laws, or by an act of law, the promisor is discharged.

Examples. 2. Horn leases a wooden building to Walter and agrees, in case it burns, to rebuild it. It burns and Walter demands that it be rebuilt. Horn defends upon the ground that, since the contract was made, the city by ordinance has forbidden the erection of wooden buildings. The defense is good. Horn is not obliged to build except in wood, and the law prevents him from building in that material.

3. Plumb agrees to work for Meaney for three months. At the end of a month Plumb is arrested and imprisoned. His contract is discharged, since the law by restraining him has made it impossible for him to perform.

b. Destruction of the subject matter of the contract. Where the existence of a specific thing is essential to performance, the contract is discharged if the thing is destroyed through no fault of the parties.

Examples. 4. DeLima agrees to let Block occupy a hall for public entertainments. Before the time for occupation arrives, the hall is destroyed by fire. The contract is discharged.

5. Seymour sells Foster a truck and agrees to repaint it and deliver it in thirty days. Before the work is finished, the truck is destroyed by fire. The contract is discharged. Neither party has any action against the other. (If the truck had been in a deliverable condition, the title would have passed to Foster at once, and he would have been obliged to pay the agreed price, although he had left the truck in Seymour's hands. This is more fully explained under the head of "Sales.")

6. When work is to be done by Stevens upon a coat belonging to Frost, the destruction of the coat discharges the contract, but Stevens may recover for the work performed upon it before its destruction.

7. One may contract against loss or destruction. For example, Dean hires a boat and contracts that in case of loss he shall pay a specified sum. The boat is lost in a storm without Dean's fault. Dean is bound to pay as agreed.

c. Death or disability in the case of contract for personal services. If the contract is for personal services, the death or incapacity of the one who is to perform such services will discharge the contract.

Examples. 8. A musician contracts to play at a theater. Owing to illness he is unable to do so. The theater manager sues for damages for breach. He cannot recover. The illness and consequent incapacity of the musician discharge the contract.

9. An unforeseen peril, as the prevalence of a dangerous contagious disease, may operate to discharge a contract for personal services within the infected district.

10. The death of a master or of a servant discharges the contract as between the survivor and the executor or administrator of the deceased person.

40. Discharge by breach of contract. A contract may be divisible or indivisible (that is, capable of separation into parts or not), and the promises may be mutually dependent or may be independent.

1. Where the promises on each side are mutually dependent and the contract is an indivisible one, a breach of performance by one party will discharge the other from performance and will give that other an action for damages against the one in default. A positive assertion by one party, prior to the time fixed for performance, that he will not perform, is an anticipatory breach and in some states gives the other party an immediate right of action.

If one party tells the other to stop performance, the latter cannot by going on add to the damages for the breach.

Example 1. Adolphus agrees to sell a piano to Britcherd for $1000. Adolphus refuses to deliver the piano and receive the purchase price. Britcherd is discharged from any further obligation; he is not bound to receive the piano in case Adolphus should afterward tender it, nor is he bound to pay anything to Adolphus; and he may maintain an action for damages against Adolphus for the refusal to deliver when performance was due.

2. If, however, the contract is a divisible one, or the transaction is made up really of a series of contracts, then the breach of one part will not discharge the other parts. The difficulty in these cases is in determining whether a contract is divisible or indivisible.

Example 2. Norrington contracts to sell Wright 1200 tons of coal in twelve monthly installments of 100 tons. Norrington fails to deliver the first installment of 100 tons. The Supreme Court of the United States held such a contract to be an indivisible one for the full amount specified, and that a failure to deliver any installment would discharge the buyer from his duty to accept all the installments. Generally in the United States such contracts are regarded as indivisible.

3. Sometimes promises are not mutually dependent, and in such a case a failure of performance on one side may not discharge a promise on the other.

Example 3. Waldo agrees to pay a certain rent for Sperry's house, and Sperry agrees to allow Waldo to occupy the house for one year and to give Waldo the option to renew the lease for a second year. Waldo falls in arrears upon his rent and Sperry refuses to renew the lease. It is held that the covenant to renew is independent of the promise to pay the rent, and therefore Sperry is not discharged from the promise to renew because of Waldo's breach of the promise to pay. These cases are not very common, and the construction is so technical as to be chiefly the business of lawyers.

4. A warranty is a subsidiary representation or promise attached commonly to a contract for the sale of goods. Generally the breach of the warranty gives the buyer the option of bringing an action for damages or of rescinding the contract and treating the contract as discharged.

Example 4. Baldero sells Josephs an electric washer and innocently warrants it to be in good repair. After Josephs has taken the washer, he

discovers that it is out of order, and attempts to compel Baldero to take it back and repay the purchase money. In most states Josephs may rescind the contract and recover his money. (See section 69 *post*.)

41. Remedies for breach of contract. A breach of contract may be of a vital or a nonvital term. Whether a given term is vital or nonvital is a question of fact for the construction of the court. A vital term is one of such importance that it goes to the life of the contract. In case a vital term in a contract is broken by one party to it, these results follow:

1. The other party is excused from further performance on his part.

2. The innocent party has an action for breach of the contract, in which he may recover as damages the contract price of whatever he has delivered or done, and also for any loss suffered by being prevented from completing the contract; or

3. By treating the contract as entirely abandoned, he may, if he chooses, recover the value of whatever he may have himself already performed; that is, he may proceed upon an implied promise to pay a reasonable price or compensation.

Examples. 1. Buss sells 10,000 feet of lumber to Dyer at $20 a thousand feet. Buss delivers 4000 feet, when Dyer refuses to receive the remainder. Buss is not bound to deliver or offer to deliver any more. Buss may sue for breach of contract and recover $80 (the contract price of that delivered) *plus* the profit he would have made upon the remaining 6000 feet, which, assuming that the lumber cost Buss $15 a thousand and is now worth in the market only $15 a thousand, would be $30.

2. Or, if Buss chooses to disregard the express contract, he may sue as upon an implied contract and recover the market value of the lumber actually delivered. Assuming that this is $25 a thousand, Buss could recover $100; but he could not recover for any loss of profits upon the portion undelivered. In case Buss has contracted to sell this lumber to Dyer at too low a price, this choice would be preferable.

3. Boyd buys a quantity of turnip seed of Slayback, who represents the seed to be from a particular variety of turnips suitable for early market. Boyd plants the seed, and the turnips raised from them are of a late variety, fit only for cattle. Boyd may recover as damages the difference between the market value of the crop he raised and that of the crop he might have raised had the seed been as represented.

If the breach is of a nonvital term, the other party is not excused from further performance, but merely has a right of action for such damages as he has suffered by reason of the breach of the particular nonvital term.

In certain classes of cases, where damages would be an insufficient remedy, the injured party may obtain from an equity court an order that the other party carry out his promise. Contracts for the conveyance of land are thus enforced, and contracts for the transfer of chattels may be enforced by an equity court if the chattel is peculiar or unique, like a patented article, which cannot be procured elsewhere than of the maker.

Actions for the breach of contracts must be brought within the time fixed by the state law called the Statute of Limitations. In case of simple contracts this is usually from three to six years, and in the case of sealed contracts, from ten to twenty years. The statutes differ somewhat in the different states. When more than the time named in the statute has passed since the breach, the contract or right of action upon it is said to be "outlawed," that is, barred by the statute. But a debt may be revived by a new promise to pay it after it is barred by the Statute of Limitations, although nearly all the states now require such a promise to be in writing. A part payment after the debt is barred will also revive the whole claim.

Arbitration. It has become increasingly common for parties to a contract to submit a dispute over an alleged breach to one or more business men as arbitrators. The arbitrator hears the evidence of both and decides whether there has been a breach and, if so, the damages suffered. The award of damages may then be recovered in a court. In some states (as, for example, New York and New Jersey) parties may agree in advance of any dispute to arbitrate, while in a majority of states the arbitration agreement is valid only if made after the dispute arises. The courts will enforce agreements to arbitrate. This method of settling commercial disputes is advantageous because it is informal, speedy, and inexpensive, and gives the parties the benefit of the training and experience of a business man who knows the trade customs and terms.

IV. Discharge in Bankruptcy

42. Insolvency laws not discharging debtor. At common law debtors could be imprisoned for debt, and such imprisonment might be of indefinite duration. It was not until 1759 that the English Parliament passed a general and comprehensive act for their relief. This act provided that prisoners in prison for debts under £100 (afterward extended to £200) might secure their release by making an assignment of all their property, with some trifling exceptions, for the benefit of their creditors; the debtor, however, was not discharged from civil liability for the unpaid portion of his debts. This was the origin of insolvency laws under which, after the abolition of imprisonment for debt, insolvent debtors continued to make assignments for the benefit of creditors in order that all might share in due proportion in the available assets. These laws were extended in England and in some of our states so as to enable creditors to compel an insolvent to make an assignment of his property for their benefit and to give the debtor a discharge from further liability. When they reach this point, they are like bankruptcy laws in effect. Early in American history imprisonment for debt was abolished.

43. Bankruptcy laws discharging debtor. Bankruptcy laws are older than insolvency laws, but were originally applied only to traders or persons engaged in buying and selling goods. These laws were framed to enable creditors to compel a bankrupt trader to turn over his property for their benefit. They were extended for the benefit of the trader, so that, upon turning over all his property for the payment of his debts, the bankrupt became discharged from further liability and could begin business again free from the burden of former debts. They were further extended so as to apply to all persons, whether traders or not, and to enable a debtor to go into voluntary bankruptcy and secure a discharge.

Thus, by an extension of insolvency laws so as to discharge a debtor from his debts as well as from imprisonment, and by an extension of the bankruptcy laws to include all debtors, the two classes of laws became practically alike.

44. The state insolvency laws. Our American states have passed laws which sometimes resemble insolvency laws and sometimes resemble bankruptcy laws. The main distinction to be observed is whether, upon assigning all his property for the benefit of his creditors, the debtor is discharged from further liability for his debts then existing. If so, the law, whatever it may be called, is practically a bankruptcy law; if not, it is practically an insolvency law.

Any state law which is in effect a bankruptcy law is now suspended by the National Bankruptcy Law, which went into effect July 1, 1898 (see next section).

Any state law which merely governs the voluntary transfer of property for the benefit of creditors, and is to that extent an insolvency law, is not suspended; but a voluntary transfer for the benefit of creditors is an act of bankruptcy, and the creditors may bring the assigning debtor under the National Bankruptcy Law if they choose.

45. National Bankruptcy Law of 1898. The Constitution of the United States confers upon Congress the power "to establish uniform laws on the subject of bankruptcies throughout the United States." If Congress does not pass such laws, the states are free to do so. But if Congress does pass such laws, the state bankruptcy laws cease to operate while such national statutes are in force. National bankruptcy laws have been in operation from 1800 to 1803, from 1841 to 1843, from 1867 to 1878, and since July 1, 1898. The state laws are therefore now suspended, but would revive if the Federal statute were repealed. If a person is discharged in bankruptcy from his debts, he may revive any of them by an express promise to pay them. Such promise requires no new consideration; it simply waives the bar raised by the discharge in bankruptcy.

46. Officers in bankruptcy. The United States District courts have jurisdiction of the trial of bankruptcy matters. Referees in bankruptcy are lawyers appointed by the various United States District courts to hear and decide bankruptcy cases on behalf of those courts. They are assistants of the courts in the dispatch of bankruptcy business. Their proceedings may be reviewed by the courts.

In nearly all bankruptcy cases a trustee is elected by a majority vote of the creditors, the number and amount of the claims being considered. His election must be approved by the court. He represents the creditors, takes title to all the bankrupt's property, collects, protects, and reduces it to money, and pays the creditors their respective shares.

47. Persons entitled to become bankrupts. Any person, partnership, or corporation (except municipal, railroad, insurance or banking corporations) may become a bankrupt upon his or its own application, that is, become what is known as a voluntary bankrupt.

On a proper application by creditors (if the debts amount to $1000 or more) any person, unincorporated company, partnership, or moneyed, business, or commercial corporation, with the exceptions noted below, may be made an involuntary bankrupt. The chief exceptions are workers on wages or salaries of not more than $1500 a year, farmers, and municipal, railroad, insurance, and banking corporations.

48. Acts of bankruptcy. These are acts which render a debtor liable to be declared by a court to be an involuntary bankrupt. If the debtor is insolvent and (1) transfers, removes, or conceals his property with the intent to delay or defraud creditors, or (2) intentionally gives a preference to one creditor over another within four months of the petition in bankruptcy, or (3) allows a creditor to obtain a preference through legal proceedings, or (4) makes an assignment of his property for the benefit of creditors, or applies for a trustee or receiver of his property, or has such trustee or receiver appointed against his will, or (5) admits in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground, he has committed an act of bankruptcy.

A person is "insolvent" if his total property, exclusive of that transferred, concealed, or removed to defraud creditors, is not sufficient to pay his debts.

A "preference" is an act by the insolvent debtor which, if allowed to stand, will result in giving one creditor a greater share of his debt than another.

49. Procedure in bankruptcy cases. An insolvent debtor who desires to become a bankrupt may, with the exceptions before noted, start a proceeding for that purpose by filing a petition in the United States District Court of his district. Three or more creditors of an insolvent debtor may in the ordinary case commence a proceeding to have the debtor declared a bankrupt by filing a petition with the same court. Proof is taken by the court as to the amount of debts and property, and the commission of the act of bankruptcy, the burden being on the petitioner to show that there is ground for adjudging the debtor bankrupt. If the court finds the proof sufficient, it issues a formal decree that the debtor is declared and adjudged bankrupt.

As soon as appointed the trustee takes title to and possession of the bankrupt's property, makes an inventory thereof, and performs such acts as are necessary to protect the property and collect debts due the bankrupt. The bankrupt is required to file a list or schedule of his property and a schedule of his creditors which serve as bases for action by the trustee.

Creditors are required to prove their claims. This is usually done by filing with the court a sworn statement as to the facts on which the claim is based. These claims are allowed or disallowed by the court, and if allowed entitle the creditor to a dividend from the assets of the bankrupt's estate when the debts have been paid and the net assets determined.

The trustee sells the bankrupt's property at public auction, unless the court sanctions a private sale. The proceeds, after the deduction of the expenses and fees, are distributed among the creditors. Secured creditors are those who have received from the debtor a mortgage, lien, pledge, or other interest in some of the bankrupt's property as security for the collection of their debts. Thus, if a creditor has a mortgage on the bankrupt's house, he is secured and may have the proceeds of the sale of the house applied to his debt first. Certain unsecured claims are entitled to payment first. For example, taxes, the cost of preserving the bankrupt's property, one attorney's fee, and wages due the bankrupt's employees are paid first in full, if the property is sufficient, and the other creditors divide what is left.

50. Claims which may be proved. Claims may be based on any one of several grounds, including promises to pay money made in ordinary contracts, damages for breach of contracts, promissory notes, judgments against the bankrupt, or damages for the commission of a tort (as, for example, slander) by the bankrupt, if the tort claim was reduced to the form of a judgment before the petition in bankruptcy was filed.

51. The discharge. After one month and within twelve months after he has been adjudged a bankrupt, the debtor may apply for a discharge from his debts. If he has conducted himself honestly, disclosed all his property, and obeyed all the court's orders, he may be given by the court a discharge from all the claims provable against him at the time of his bankruptcy, with some exceptions. This discharge enables the bankrupt to start business afresh, and property afterward acquired by him will not, of course, be liable for his old debts, since such debts are wiped out by the discharge. The following are the principal classes of debts which are not affected by a discharge in bankruptcy, and which therefore survive the bankruptcy: taxes; liabilities for obtaining property by false pretenses; liabilities for willful and malicious injury to persons or property; claims for alimony, the maintenance of wife and children, seduction, breach of promise to marry, and criminal conversation; liabilities for embezzlement while acting in a fiduciary capacity; and wages of the lower grades of employees earned within three months of the bankruptcy.

REVIEW QUESTIONS AND PROBLEMS

33. Who are liable on contracts? What exception to this rule is there? How may a third person render himself liable by interfering with a contract? What is a boycott?

34. May a third person (Day) sue upon a contract made by Jones and Betts? Under what circumstances? May a person not named in the contract between Jones and Betts sue upon it? When?

Problem 1. Ward engages Banks to make an abstract of Ward's title to real property. Banks negligently fails to note on the abstract a recorded mortgage which is a lien on the lands. Ward wishes to borrow money of Grigsby upon mortgage, and gives him the abstract which shows the land clear of encumbrances. Grigsby loans the money and takes a mortgage.

He then discovers the earlier mortgage. The land is insufficient in value to pay both mortgages, and Grigsby suffers loss. He sues Banks for damages. Can he recover?

35. Why can a person not assign his liabilities? What rights under a contract can one assign? What rights can he not assign? What does the assignee get?

Problem 2. Belden contracted to sell to Stapleton 10,000 tons of ore at the rate of 50 tons a day, to become the property of Stapleton when delivered. After delivery the ore was to be sampled and tested and the price fixed by the daily market quotation. Stapleton assigned the contract to Corson. Belden refused to deliver to Corson, who sues Belden for damages. Is Belden liable?

Problem 3. Browne contracted to make certain articles for Bliss, to be used by him in his business and to be paid for when delivered. Bliss sold his business to Coons and assigned this contract to Coons. Browne refused to supply the articles to Coons, who sues Browne for damages. Is Browne liable?

Problem 4. McCormack contracts to sing at Hammerstein's theater. Hammerstein sells the theater to Shubert and assigns McCormack's contract to Shubert. McCormack refuses to sing, and Shubert sues McCormack for breach of contract. Is McCormack liable?

36. Distinguish assignability from negotiability. To what contracts does the latter apply?

37. What effect does the death of a party have upon a contract? What contract obligations do not survive death? What is the effect of the bankruptcy of a party to a contract? At common law what was the effect of marriage upon a woman's contract? How is this changed by statutes?

38. How may parties discharge their contracts by agreement? Does a bilateral contract need a new consideration for mutual discharge? Does a unilateral contract? Give an example of substituted contract and of a contract containing provisions for a discharge. What is discharge by performance? What is the effect of tender of performance? What is legal-tender money? What is the effect of taking a debtor's check? What is the doctrine of substantial performance? What is the effect of promising to perform to the satisfaction of another?

Problem 5. Jennings sold Lacey a vacuum cleaner on condition that Lacey might use it and, if he did not like it, return it. Lacey used the machine so badly that it was injured. Lacey then offered to return it, but Jennings refused to receive it and sued for the price. Can he recover?

39. Effect of impossibility existing when contract is made? existing and not known? arising subsequently? What three exceptions to the general rule are there? Explain and illustrate each.

Problem 6. Dexter agreed to sell and deliver to Norton 607 particular marked and identified bales of cotton. Dexter delivered 460 bales, when the remaining 147 bales were destroyed by fire without fault of either party. Norton sues Dexter for breach of contract in not delivering the 147 bales. Is Dexter liable?

Problem 7. Hayes engages Willis as a farm servant. Hayes dies. Hayes's executor refuses to retain Willis on the farm. Willis sues the executor for breach of Hayes's contract. May he recover?

40. When will breach by one party discharge the other? What is an anticipatory breach, and what is its effect? When will breach by one not discharge the other? What are divisible contracts? What are independent promises? Effect of breach of warranty?

Problem 8. Windmuller bought a quantity of iron of Cushing in January, 1925, to be delivered and paid for on July 15, 1925. On June 12, 1925, Windmuller notified Cushing that he would not receive or pay for the iron. Cushing sold the iron elsewhere and sued Windmuller at once for damages without waiting until July 15. May he recover?

Problem 9. Clark engaged Marsiglia to clean and repair certain pictures at a specified price for each. After Marsiglia had begun work, Clark countermanded the order, but Marsiglia persisted in finishing the work and sued Clark for the full contract price. Can he recover?

Problem 10. Hill buys Stiles's farm for $3000 on these terms: $500 down; $1000 in three months; $1500 in six months; the deed to be delivered to Hill at the end of six months. (1) Stiles sues for the $1000 at the end of three months. (2) Stiles sues for the $1500 at the end of six months. In each case Hill defends on the ground that Stiles has not delivered the deed. Result?

41. If Deming breaks his contract with Newson, state Newson's rights and remedies. What is specific performance and by what court granted? What is the Statute of Limitations? How may a debt barred by the statute be revived?

Problem 11. Teemins sells Calber 10,000 bushels of potatoes at 50 cents a bushel, to be delivered in quantities of 500 bushels. Teemins delivers 2000 bushels, when Calber refuses to receive any more. Assume potatoes to be worth at the time of breach 60 cents a bushel; how much may Teemins recover of Calber in case he sues Calber for breach of contract? How much may he recover if he disregards the express contract and sues for the value of the potatoes actually delivered?

Problem 12. If in the above problem the market price of potatoes at the time Calber commits the breach is 40 cents a bushel, what will be the most advantageous remedy for Teemins to pursue?

42. What was the object of the first insolvency laws? How were they extended?

43. What were bankruptcy laws and for whose benefit were they enacted? How were they extended?

44. What is the present distinction between insolvency laws and bankruptcy laws? Are bankruptcy laws in force by state legislation? Are insolvency laws in force by state legislation?

45. When have national bankruptcy laws been in force? How long has the present one been in force?

46. What courts have charge of bankruptcy matters? What is a referee in bankruptcy? a trustee in bankruptcy?

47. Who may become a voluntary bankrupt? Who may become an involuntary bankrupt?

48. What are the acts of bankruptcy? When is a debtor insolvent? What is a preference?

49. How is a bankruptcy proceeding started? What proof does the court take? What does the trustee do? Which creditors are secured? Which creditors are entitled to priority?

50. What may be made the basis of a claim in bankruptcy?

51. When may a bankrupt get his discharge? What is the effect of the discharge?

PART II. PARTICULAR CONTRACTS CONCERNING GOODS

CHAPTER IV

SALES OF GOODS

I. The Contract

52. Definition and analysis. The sale of goods is now regulated in many states[1] by the Uniform Sales Act. This statute was prepared by the Conference of Commissioners on Uniform State Laws. It sets forth the rights and duties of seller and buyer in contracts relating to the sale of goods, and, while changing the law in some states in some respects, it in the main embodies the previously existing common-law views. A contract of sale is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a consideration called the price. Where the result of the contract is to transfer the title to the goods to the buyer, there is strictly a sale; but where the title is to be transferred at some later time, there is only a contract to sell.

Examples. 1. "I will sell you my automobile for $1000." "I accept." This is a sale. The title passes at once. If the automobile is accidentally destroyed, the loss falls on the buyer, even though the machine had not yet been delivered.

2. "I will sell you my colt for $100 when he is a year old." "I accept." This is a contract to sell. The title remains with the seller until the colt is a year old. It then passes to the buyer and the contract to sell becomes a sale.

3. The colt dies before he is a year old, without fault of either party. The contract is discharged.

[1] Alaska, Arizona, Connecticut, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming.

1. *It is a contract.* This means that all the elements heretofore discussed, namely, agreement, competent parties, sufficient consideration, in some cases a writing, legality, and real assent, must exist in a contract of sale. These need not be again discussed at this point, but the nature of the consideration and the form (Statute of Frauds) will call for notice under another head. It is also important to note that where necessaries are sold to an infant, or minor, or to a person under mental incapacity, as a lunatic, he must pay a reasonable price therefor. What are necessaries depends upon the social and financial condition of the infant or lunatic, and upon his actual needs at the time of the sale (see sections 15 and 16 *ante*).

2. *Whereby the seller transfers or agrees to transfer.* If the seller transfers the property in the goods, the sale is said to be executed; the seller's title passes from him; the buyer's title is complete. If the seller merely agrees to transfer the property in the goods, the sale is said to be executory; the seller's title is left in him; the buyer has only a right of action under the contract, and he has not any title in the goods. It is one of the important questions in the law of sales as to when the title passes, that is, whether the sale is executed or executory. This will be discussed hereafter. It should be observed that the *contract* may be executory while the *sale* is executed; that is, the agreement to pass title may be executed while the rest of the promises in the contract are yet to be performed.

Examples. 4. "I will sell you my mowing-machine for $100 and deliver it to you tomorrow at your farm, you to pay the money at that time." "I accept." This is an executed sale, that is, the title passes at once to the buyer; but it is still an executory contract, that is, each party has still something to do in the way of performance, namely, delivery and payment.

5. If the seller and the buyer agree as above, but the seller also agrees to repair the mower before delivery, the title does not pass until the machine is repaired. This is an executory sale and an executory contract.

3. *Property in the goods.* By the term "goods" is meant, generally, every kind of personal property, except money and claims or choses in action like promissory notes. Examples of goods are movable property having a body or substance, like a horse or

a bushel of wheat, and property incapable of being touched or handled, like a patent right or a trade-mark. By property is meant the ownership of the goods or the general title to the goods. In order to pass this property to the buyer, it is necessary that the seller should have it, for the general rule in sales is that "a buyer acquires no better title to goods than the seller had." Three important exceptions to this rule may be noted.

a. In the negotiation of negotiable instruments the transferor may give a better title than he has himself. This is not technically a sale, because a negotiable instrument is a chose in action and not "goods."

b. By certain laws known as the Factors' Acts which exist in a few states it is provided that a factor (that is, an agent) or commission merchant who is intrusted by the owner with goods or documents of title representing goods, under conditions indicating apparent authority to sell, may sell or otherwise dispose of them and give good title as if he were the true owner of the goods or documents or had authority from the true owner (see section 143 *post*). A document of title is a paper like a bill of lading or a warehouse receipt.

c. If the buyer leaves the seller in possession of the goods, or of the documents of title to the goods which provide for delivery of the goods to the seller or to the bearer, and the seller sells the goods a second time and delivers the goods or the documents to the second innocent purchaser, it is the general rule that the second buyer may retain them as against the first buyer, since the first buyer has made it possible for the seller to commit the fraud. So, if the true owner invests another person with the appearance of ownership, and the latter sells to an innocent purchaser for value, the true owner will be estopped to set up his title against the innocent purchaser.

But if one sells and delivers goods to another, retaining title in himself so as to secure the payment of the purchase money, and the buyer resells them to an innocent purchaser for value, the latter gets at common law no title against the first seller, who retained the title. This has led to such hardship upon innocent purchasers that statutes now generally provide that such conditional sales

shall be void as against innocent purchasers from the buyer who hold them under an installment contract, and against certain creditors of such buyer, unless the contract is in writing and recorded in some public office. The retention of title is merely a form of security, like a chattel mortgage, and chattel mortgages are not valid against innocent purchasers of the mortgaged chattels unless duly recorded.

When the seller has been induced by fraud of the buyer to sell his goods and part with the possession, he may rescind or cancel the contract and recover the goods. But if, before he does so, the buyer resells them to an innocent purchaser for value, the latter gets a title good against the first seller who has been defrauded.

Who is "a purchaser in good faith and for value"? First, one who purchases without notice of his vendor's defective title, and without notice of facts which should cause him to make inquiry concerning the title; and, second, one who also pays a valuable consideration. A promise to pay is not sufficient, since, if the true owner recovers the goods, this purchaser will never be obliged to pay his vendor. On the question of whether taking the goods in payment of an old debt owing the buyer from his vendor makes the buyer a purchaser for value, the courts differ. Some hold that it does not, because if the buyer has to give up the goods, the debt is restored and he is in no worse position than he was before; others hold that it does, because the buyer has been "lulled into security" and may thereby lose the debt which he otherwise would have collected. "Lulled into security" means that the creditor has been led to believe that the debt was satisfied and has therefore taken no other steps to collect. There is the same difference of opinion where the buyer takes the goods from his vendor as security (for example, as a pledge or mortgage) for an old debt. The Sales Act and prevailing view is that taking goods as security for, or in payment of, an old debt does make the taker a purchaser for value. It is generally held that an attaching creditor or an assignee in bankruptcy is not a purchaser for value.

Examples. 6. Nelson sells his cow to Bailey, and Bailey allows Nelson to retain possession. Nelson then sells and delivers the cow to Knapp, who does not know of the previous sale. Knapp may retain the cow as against

Bailey, for the latter by leaving Nelson in possession made it possible to commit the fraud, and Bailey must suffer the loss rather than Knapp.

7. Stringer owns a wagon. He rents it to McCarty, who with the consent of Stringer paints on it "McCarty, Piano Mover" and uses it in his business. McCarty sells the wagon to Maher, who believes McCarty to be the owner. Stringer cannot reclaim it from Maher. He has invested McCarty with the appearance of ownership. But if Stringer had merely rented the wagon without authorizing McCarty to put his name on it, the purchaser would have obtained no title as against Stringer.

8. Snell sells and delivers a piano to O'Brien, but by the contract retains title until it is fully paid for. O'Brien sells it to Webb for value, Webb supposing O'Brien to be the owner. Snell brings an action to recover it from Webb. Snell will recover unless some statute changes the rule of the common law; but Webb gets whatever rights O'Brien had, and, by paying what the latter still owes, may acquire title, unless O'Brien has already by default forfeited his rights. In most states now Webb would, by statute, be entitled to keep the piano, unless Snell had filed the installment contract in a public office like the county clerk's office.

9. Hardt sells and delivers boxes to Lowden, a retail dealer in boxes, but retains title in the boxes and provides that the proceeds of sales by Lowden shall belong to Hardt so far as necessary to pay Hardt. Lowden sells the boxes to Cheney and Hardt brings an action against Cheney to recover them. It is held that Hardt cannot recover, because he has authorized Lowden to sell. There are two inconsistent provisions,—that Hardt shall have title, and that Lowden shall sell and give good title. The latter must prevail as to an innocent purchaser from Lowden.

10. Frazee sells goods to Newberry, who gives Frazee in payment a bill of exchange accepted by Van Etten. It turns out that the bill is forged, no such person as Van Etten being in existence. Newberry resells and delivers the goods to King, and Frazee then seeks to recover the goods from King. He cannot do so. Frazee has a right to rescind the contract with Newberry for fraud and recover the goods while in Newberry's hands; but he cannot recover them from King, who has purchased in good faith from Newberry.

11. Goldberg is induced by fraud to sell goods to Higgins, who then transfers them to Darwin in payment of a prior debt owing by Higgins to Darwin. Goldberg cancels the contract with Higgins and seeks to recover the goods from Darwin. According to the prevailing American rule Darwin is held to be a purchaser for value and Goldberg cannot recover the goods.

4. *For a consideration called the price.* At common law a sale differed from a barter in that in a sale the consideration must be in money, while in a barter it might be other goods, labor, or the like.

Under the Uniform Sales Act, sale is held to include barter, and the price need not be payable in money but may be payable in any personal property. It is not necessary that the price should be

Know all Men by these Presents,

That I. Richard Atkins, *of the city of* Cleveland, Cuyahoga County, Ohio, *of the first part, for and in consideration of the sum of* sixty *Dollars* ($ 60.00), *lawful money of the United States, to* me *in hand paid, at or before the ensealing and delivery of these presents, by* Joseph Dudley, of the same place, *of the second part, the receipt whereof is hereby acknowledged, ha*ve *bargained and sold, and by these presents* do *grant and convey unto the said part*y *of the second part,* his *executors, administrators and assigns,* one Universal typewriter, model 1924 No. 163,241.

To Have and to Hold *the same unto the said part*y *of the second part,* his *executors, administrators and assigns forever. And* I *do covenant to and with the said part*y *of the second part that* I am *the* owner *and ha*ve *the right to sell and transfer the said property, and will defend the same against any person or persons whomsoever claiming the same.*

In Witness Whereof, I *ha*ve *hereunto set* my hand *and seal the* second *day of* May *in the year One thousand nine hundred and* twenty-five.

In presence of
Henry Lathrop

Richard Atkins [SEAL]

[L.S.]

BILL OF SALE

fixed by the contract. It is enough if it fixes a method of determining the price, and it may be ascertained by the ordinary market price or left to some third person to fix or determine.

5. *Bill of sale.* A bill of sale is a formal document, corresponding to a deed of real property, whereby the seller transfers to the buyer the title to certain goods. It is used in sales of any considerable amount, but may be used in any sale.

53. Statute of Frauds. The American Statutes of Frauds which are founded on the seventeenth section of the English Statute of Frauds generally provide that contracts for the sale of goods of a certain value or more (see section 23 *ante*, for the amounts fixed in the various states) must be evidenced either (1) by the acceptance and receipt of the goods or part of them, or (2) by the payment of some part of the purchase price, or (3) by some note or memorandum in writing signed by the party to be charged or by his lawful agent (see section 23 *ante*).

1. *What are goods?* The English statute uses the phrase "goods, wares, or merchandise." Under this it was held that the sale of choses in action (that is, shares of stock, contract claims, etc.) need not comply with the statute, since they were not "goods, wares, or merchandise." The holding in the United States has been generally to the contrary. The Sales Act and other state statutes expressly name "choses in action," and in many the term "personal property" is substituted.

2. *Distinction between contract of sale and contract for work and labor.* It is sometimes difficult to tell whether a contract is one of sale or one for work and labor. If for a sale, the contract must be in writing or validated by a memorandum, part payment, or acceptance and receipt; if for work and labor, there does not have to be any writing or other formality at all.

Example 1. Arnold goes to Green's carriage factory and orders Green to make a carriage according to a certain description, for which Arnold agrees to pay $500. When it is finished, Arnold refuses to take it, and pleads the Statute of Frauds. Is this a contract of sale? If so, Green cannot recover against Arnold, because there has been no receipt of goods, no part payment, and no note or memorandum in writing. Or is it a contract for work and labor? If so, Green may recover against Arnold, because such a contract is not mentioned in the Statute of Frauds and is therefore good however made or evidenced. The general American rule and the rule under the Uniform Sales Act is that if the article is such as the vendor, in the ordinary course of his business, manufactures for the general market, the contract is one of sale; but if it is made to a special order for a special purchaser, and not for the general market, the contract is for work and labor. Under this rule the contract specified would be for work and labor, and the statute would not be a defense.

3. *Distinction between personalty and realty.* It is also sometimes difficult to tell whether articles attached to lands or buildings are personal property or real property; for example, crops, trees, ice, machinery, buildings, etc. In general, crops raised annually by labor are treated as personalty. Trees, fruit on the trees, buildings, and minerals in place are treated as interests in land at common law. Ice on a pond has been held to be goods as the subject of a sale. Under the Uniform Sales Act a sale of anything attached to or forming a part of land, which is to be severed from the land at any time, is a sale of goods. If the article sold is treated as realty, then, whatever its value, there must be a writing. If it is treated as personalty, there need be no formality unless it is of the statutory value, and then a writing may be dispensed with if there is part acceptance and receipt or part payment (see sections 181, 182 *post*).

Examples. 2. Grant sold Kenney orally a growing crop of five acres of turnips for $25, no present payment. Grant gathered the turnips when ripe and Kenney claimed them. Grant pleads the Statute of Frauds on the ground that the sale was of an interest in land. That statute does not apply nor does the seventeenth section, because the price was only $25. The turnips while growing, as well as when gathered, are personalty, and not an interest in lands. They are an annual crop, known to the law as *fructus industriales*.

3. Metcalf sold a growing crop of hay to Barker by oral agreement for $5000, with no payment down. Metcalf gathered the hay. Barker claims it. Metcalf pleads the Statute of Frauds. Under the Uniform Sales Act the contract is one for the sale of goods, since the hay is to be cut under the contract, and, as there is no part payment, acceptance and receipt, or memorandum, the Statute of Frauds is a defense.

4. *Acceptance and receipt.* One way of satisfying the Statute of Frauds is by an acceptance and receipt of the goods or a part of them. Both acceptance and receipt are necessary to satisfy the statute, although it is not necessary to have both to pass title.[1] Acceptance is a statement or other act by the buyer expressing his consent to become the owner of certain specific goods. Receipt is taking the goods actually or constructively into the possession of the buyer.

[1] On the requirements for passing title see sections 59–61.

Examples. 4. Vedder buys a quantity of wheat of Leamon, who takes a load to Vedder's warehouse, where it is inspected by Vedder and Vedder says: "This is all right. I'll take it." The wheat is put in Vedder's barn. Vedder afterward refuses to take the rest, and when sued, pleads the Statute of Frauds. His acceptance and receipt of one load satisfies the statute, and Leamon may prove the contract for the whole.

5. Acceptance may take place without receipt. Thus, Vedder inspects the wheat in Leamon's granary and expresses his assent to becoming the owner. If this wheat be then delivered to a common carrier, as a railway company, for transportation to Vedder by his direction, there is both acceptance and receipt, because the carrier is regarded as agent of the buyer to receive, although not to accept.

5. *Part payment.* If one, instead of accepting and receiving the goods, pays any part of the purchase money, this also satisfies the statute, and he is bound by the contract. Generally payment at any time is sufficient. Giving a check is not generally payment until the check is cashed.

6. *The note or memorandum.* There need not be a full and detailed written contract. It is enough if the writing contain the names of the parties, the subject matter of the sale, and the agreed price. It may be printed or written, and may be in pencil. It is best that both parties should sign it, for it is uncertain which may seek to avoid the performance. But it is enough that the one who is sought to be held to the contract has signed.

Example 6. Sparks buys of Ducas 20,000 feet of lumber at $20 a thousand feet. Sparks signs the memorandum but Ducas does not. Ducas may maintain an action against Sparks in case he refuses to take the lumber, but Sparks could not maintain an action against Ducas in case he refused to deliver it. If both had signed, then each could have enforced the contract against the other.

An authorized agent may sign for either party. An auctioneer is the agent of both buyer and seller for the purpose of making the memorandum. The note or memorandum may be contained in two or more papers or letters if they are connected by references the one to the others or if they are physically fastened together. It may be made at any time and need not be made at the time the contract is formed.

FORM OF CONTRACT OF SALE

This Agreement, made this fifth day of September, 1925, between John Buck, of Roxbury, Massachusetts, and Richard Dixon, of the same place,

Witnesseth, that the said John Buck, in consideration of the agreement hereinafter contained, to be performed by the said Richard Dixon, agrees to sell and deliver to the said Richard Dixon, at the farm of the said John Buck, five hundred bushels of potatoes of good marketable quality, on the twentieth day of October, 1925. And the said Richard Dixon, in consideration thereof, agrees to pay to the said John Buck the sum of sixty cents a bushel for the said potatoes, immediately upon the completion of the delivery thereof.

In Witness Whereof, the said parties have affixed hereto their respective signatures the day and year first above written.

John Buck
Richard Dixon

A much simpler form would satisfy the Statute of Frauds, which requires only a note or memorandum. For example:

John Buck has sold to Richard Dixon five hundred bushels of potatoes at sixty cents a bushel, to be delivered Oct. 20, 1925.

John Buck
Richard Dixon

Roxbury, Massachusetts, Sept. 5, 1925.

If only Buck signed, he would be bound but Dixon would not.

54. Conditional sales. The conditional or installment sale is a means of selling goods on credit which is very widely used. The seller gives the buyer possession of the goods and takes a small payment down, and the buyer agrees to pay the balance in installments. The seller reserves title to the goods in himself until the entire price is paid. In eight states[1] this transaction is now governed by the Uniform Conditional Sales Act. The seller is entitled to take back the goods if the buyer fails in his payments. Usually, under modern statutes and rules of the courts of equity, if the buyer has paid any substantial sum on the price at the time of his default, he is entitled to get that sum back, less the depreciation on

[1] Arizona, Delaware, New Jersey, New York, South Dakota, West Virginia, Wisconsin, and Alaska.

the goods due to wear and tear; but in some states the buyer who has defaulted loses all he has paid. The seller may also, upon the buyer's default, sue the buyer for the balance due on the contract, provided that the goods are not readily resalable. This latter remedy forces title on the buyer, and leaves the seller with nothing but a judgment for the price. It is generally held that once the seller has taken back the goods, he cannot afterward sue for the price; and once he has sued for the price, he cannot later take back the goods. He must choose between these two alternative remedies.

The seller is obliged to file his contract in a public office, if he wishes to protect himself against the buyer's creditors and against purchasers from the buyer. If the seller does not file his contract, and the creditors of the buyer take the goods, they can hold them. So too failure to file will enable a person who buys the goods from the conditional buyer, thinking he is the owner, or takes a mortgage with a like belief, to hold the goods against the conditional seller.

If the goods are injured, lost, or destroyed while the conditional buyer is holding them and making his payments, the loss falls on the buyer, and he must complete his payments.

Examples. 1. Collin bought a Ford car on the installment, or conditional-sale, plan, paying $100 down, getting possession of the car, and agreeing to pay the balance in twenty equal installments. Title was to remain in the dealer till Collin had paid the whole price. After paying $300 Collin took sick, lost his position, and failed to make a payment which was due. The dealer took back the car. Under the Uniform Conditional Sales Act and other modern statutes and rules of equity the dealer will have to pay Collin back the $300 less the depreciation on the car. The amount of the depreciation will ordinarily be estimated by selling the car a second time and seeing what it brings.

2. Carter, a dealer in farm implements, sells to Wilkins, a farmer, a threshing-machine on the installment plan. After making several payments Wilkins fails to pay one installment. Carter brings an action to recover the amount due. Later he hears that Wilkins is in bad financial condition and that a judgment against him will not be worth much. Carter therefore tries to take back the machine. In most states he is not allowed to do this, because he has chosen the remedy of collecting the price and making Wilkins the owner, and cannot later take the inconsistent course of claiming that he, Carter, is still the owner.

55. Consignments and conditional sales for resale. A wholesaler or jobber may deliver goods to a retailer either on consignment or as a conditional buyer. If the former method is used, the retailer becomes merely an agent, and the goods in the hands of the retailer are not subject to the payment of his debts, while if the retailer is holding goods as a conditional buyer, on the installment plan, generally the contract will have to be filed in order to be good as against the retailer's creditors and as against purchasers from the retailer.

Example. Murphy, a wholesaler, ships to Burnett, a merchant at Xenia, Ohio, $400 worth of rubbers, boots, and shoes, specifying that the goods are sent on consignment only and are to be sold by Burnett as agent of Murphy. While the goods are in Burnett's store they are not liable to be taken for his debts, and it is not necessary that the consignment contract be filed. If, on the other hand, Murphy has agreed with Burnett that Burnett was to buy the goods from Murphy on the installment plan, and to have title only when he paid for them, but was meanwhile to have the right to sell the goods to customers at Xenia, the contract would have been called a conditional sale with power to resell, and would, according to most courts, have had to be filed by Murphy in order to make it good against Burnett's creditors who might levy on the whole stock of goods. But a customer buying a single pair of rubbers from Burnett gets good title because such a resale was authorized in the contract between Murphy and Burnett.

56. Trust receipts. The trust receipt is a credit device used in the case of the purchase or importation of goods. The buyer of the goods gets possession of the goods and authority to sell them or to manufacture and sell them, by giving to the seller of the goods, or to the bank which lends the buyer the price of the goods, a document known as a trust receipt. By this paper the buyer admits that he holds the goods in trust for the seller, or the banker, and will apply the money he gets from selling the goods toward paying the price due to the seller or the loan due to the banker. It has generally been held that this trust receipt protects the seller or banker, without any recording of the paper, against the buyer of the goods, and his creditors and subpurchasers from the buyer. This method has been followed especially in the case of the importation of goods, where the buyer borrowed money, gave

the bank the bill of lading, and then got the goods from the bank by giving the bank the trust receipt; but the transaction is becoming increasingly important in other commercial dealings, as, for example, in the case of the shipment of automobiles by a wholesaler to a retailer, to be kept by the retailer in his garage under a trust receipt given to the wholesaler.

Example. Olney imports silks from France, and to raise the necessary funds borrows $10,000 at the Merchants' Bank. As security for the loan he gives the bank possession of the bill of lading issued by the steamship line. When the goods reach America, the bank delivers to Olney the bill of lading so that he can get the silk from the wharf, and manufacture and sell it. The bank takes from Olney a trust receipt, in which he admits holding the silk for the bank, and agrees to apply the proceeds of his sales of the silk toward paying his debt to the bank. Olney's property is levied on by another creditor. It is held that the trust receipt protects the bank and that the bank can take the property as security for its debt, in preference to the other creditor of Olney. No record of the trust receipt in the county clerk's or other office is required.

57. The Sales-in-Bulk Statutes. In nearly all states there are now so-called Sales-in-Bulk Acts which require a merchant who is about to sell his entire stock to notify all his creditors several days before the sale of the entire stock, so that they may take steps to protect themselves. If he does not notify his creditors in this way, the sale of the entire stock may be set aside by the creditors who are injured.

Example. McManus is a grocer at Whitney's Point, N. Y. The Excel Wholesale Grocery Company has a claim against him for $500 for goods sold, and learns that on October 5 McManus gave a bill of sale of his whole stock to one Jonnard, to whom he owed money for a farm which he (McManus) had bought. Since the company received no notice of this intended sale in bulk, it may have the sale set aside and McManus restored to his ownership of the stock, so that the company can collect its debt.

58. Equipment trusts. The equipment trust is a credit device enabling railroads to buy cars, engines, etc. on the installment plan. The manufacturer of the equipment sells it to a trustee (usually a bank or trust company), and the trustee leases the equipment to the railroad. The trustee issues equipment-trust certificates which

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56. Trust receipts. The trust receipt is a credit device used in the case of the purchase or importation of goods. The buyer of the goods gets possession of the goods and authority to sell them or to manufacture and sell them, by giving to the seller of the goods, or to the bank which lends the buyer the price of the goods, a document known as a trust receipt. By this paper the buyer admits that he holds the goods in trust for the seller, or the banker, and will apply the money he gets from selling the goods toward paying the price due to the seller or the loan due to the banker. It has generally been held that this trust receipt protects the seller or banker, without any recording of the paper, against the buyer of the goods, and his creditors and subpurchasers from the buyer. This method has been followed especially in the case of the importation of goods, where the buyer borrowed money, gave

the bank the bill of lading, and then got the goods from the bank by giving the bank the trust receipt; but the transaction is becoming increasingly important in other commercial dealings, as, for example, in the case of the shipment of automobiles by a wholesaler to a retailer, to be kept by the retailer in his garage under a trust receipt given to the wholesaler.

Example. Olney imports silks from France, and to raise the necessary funds borrows $10,000 at the Merchants' Bank. As security for the loan he gives the bank possession of the bill of lading issued by the steamship line. When the goods reach America, the bank delivers to Olney the bill of lading so that he can get the silk from the wharf, and manufacture and sell it. The bank takes from Olney a trust receipt, in which he admits holding the silk for the bank, and agrees to apply the proceeds of his sales of the silk toward paying his debt to the bank. Olney's property is levied on by another creditor. It is held that the trust receipt protects the bank and that the bank can take the property as security for its debt, in preference to the other creditor of Olney. No record of the trust receipt in the county clerk's or other office is required.

57. The Sales-in-Bulk Statutes. In nearly all states there are now so-called Sales-in-Bulk Acts which require a merchant who is about to sell his entire stock to notify all his creditors several days before the sale of the entire stock, so that they may take steps to protect themselves. If he does not notify his creditors in this way, the sale of the entire stock may be set aside by the creditors who are injured.

Example. McManus is a grocer at Whitney's Point, N. Y. The Excel Wholesale Grocery Company has a claim against him for $500 for goods sold, and learns that on October 5 McManus gave a bill of sale of his whole stock to one Jonnard, to whom he owed money for a farm which he (McManus) had bought. Since the company received no notice of this intended sale in bulk, it may have the sale set aside and McManus restored to his ownership of the stock, so that the company can collect its debt.

58. Equipment trusts. The equipment trust is a credit device enabling railroads to buy cars, engines, etc. on the installment plan. The manufacturer of the equipment sells it to a trustee (usually a bank or trust company), and the trustee leases the equipment to the railroad. The trustee issues equipment-trust certificates which

not passed, the seller's only action would in some cases be for damages for breach of the contract to receive and pay for the goods.

In determining the question as to when title passes it is necessary to classify goods into (1) specific or ascertained goods, that is, goods upon which the minds of the parties meet, goods which have been seen and identified, and (2) nonspecific or unascertained goods, that is, goods described but either not yet in existence or, though in existence, not actually chosen or specifically indicated.

Example. (1) McConnell purchases all the barley in Hughes's granary; these goods are specific. (2) McConnell purchases of Hughes one thousand bushels of barley (no particular barley indicated); these goods are unascertained. Title to the barley in the granary would ordinarily pass to McConnell as soon as the contract is made, because delivery is not necessary to pass title, while title to the one thousand bushels would not pass until the goods are ascertained and set aside for the contract by consent of both parties. A ready-made suit of clothes, before the eyes of merchant and customer, is an instance of specific or ascertained goods; an overcoat, ordered and to be made up from cloth in the tailor's possession, is an example of unascertained goods.

60. Specific, ascertained goods. The general and particular rules for determining when title passes in the sale of specific, ascertained goods are as follows:

1. *General rule.* Where there is a contract for the sale of specific, ascertained goods, the property in the goods is transferred to the buyer at such time as the parties to the contract intend it to be transferred. It thus appears that the intention of the parties is the controlling test. If this intent is stated in so many words, there can be no doubt; but it is not ordinarily expressed, and the law has therefore certain rules for finding out what the parties meant about passage of title. In fixing these rules the law looks to the terms of the contract, the conduct of the parties, and all the circumstances of the case.

2. *Particular rules.* Unless a different intent appears, the following rules are applied for the purpose of determining the time at which the title to the goods passes to the buyer.

Rule 1. *Where there is a contract, without conditions, for the sale of specific goods in a state ready for delivery, the title to the*

goods passes to the buyer when the contract is made, even though payment or delivery, or both, may be postponed to a future time.

Example 1. Elmer purchases Alger's motor cycle for $100, and it is agreed that the motor cycle shall be delivered and the price paid one week later. The next day the motor cycle burns up. Elmer must pay the price, because the motor cycle is his under this rule, as much so as if it had actually been delivered to him and he had paid for it.

Rule 2. *Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a state ready for delivery, the property does not pass until such thing be done.*

Example 2. Deyo purchases Hammond's carriage, and Hammond agrees to have the carriage painted and to deliver it one week later. The next day, and before the carriage is painted, it burns up. Deyo is not bound to pay the price. The loss falls upon Hammond, because the title does not pass from him to Deyo until the carriage is painted. The loss falls upon him who has the title. After the carriage is painted, the title passes to Deyo even before delivery.

Rule 3. *Where there is a contract for the sale of goods in a state ready for delivery, but the seller is bound to weigh, measure, test, or do some other act with reference to the goods for the purpose of fixing the quantity or quality and the price, under the prevailing rule the title passes when the contract is made, and the weighing, measuring, or testing is not necessary to pass the title.*

Example 3. Hill purchases all the wheat in Slayton's granary at 80 cents a bushel, and Slayton agrees to measure the wheat in order to ascertain the sum Hill is to pay. The title passes to Hill on the making of the contract, notwithstanding that Slayton has not measured the wheat. Should it be destroyed after the contract but before measurement, the loss would be Hill's and not Slayton's.

Rule 4. *Where goods are sold and delivered to the buyer with an option to return them if he is not satisfied, or for other reason, the title passes to the buyer subject to a right in the buyer to transfer the title back to the seller by a return within the time specified, or, if no time be specified, within a reasonable time.*

Example 4. Walrath purchases Carter's mowing-machine, with the agreement that if it does not suit him, Carter will take it back at the price

Walrath paid or agreed to pay. This is a purchase by Walrath and a contract to give Walrath an option to sell the machine back to Carter. The title is in Walrath until he exercises this option.

Rule 5. *Where goods are delivered to the buyer "on approval" the title remains in the seller until the buyer gives his approval. Such approval may be given expressly or impliedly. If the buyer retains the goods beyond the time fixed, or, if no time be fixed, beyond a reasonable time, he will be regarded as having given his approval, and title will then vest in him. The sale of the goods by him would be an approval.*

Example 5. Walrath takes Carter's mowing-machine "on three days' trial and approval." The title is in Carter until the three days have elapsed or Walrath has sooner expressed his approval.

Rule 6. *Where there is a sale of goods in a condition ready for delivery, the seller may by the terms of the contract reserve the title in himself until the price is paid. This right may be reserved notwithstanding actual delivery to the buyer.*

Examples. 6. Meyer sells Pettie household goods, retaining title until the goods are paid for. Title, as security at least, is still in Meyer. It is generally held that after Pettie has possession, risk as to loss falls upon him, since Meyer's title is in the nature of a security for payment only. It is also the law in many states that in order to protect himself against an innocent purchaser of the same goods from Pettie, the seller must file the written contract in some public office.

7. Travis sells goods to Moran to be shipped. Travis, in shipping the goods, takes the bill of lading (freight receipt) in his own name or deliverable to his own order. Title, as security, is still in Travis.

8. Logan sells goods to Dows, takes the bill of lading in Dows's name, attaches it to a bill of exchange (draft) drawn upon Dows for the price, and forwards the draft and bill of lading to Dows. Logan reserves a right to the possession of the goods as against Dows. Dows is bound to accept or pay the draft, or return the bill of lading. If he retains the bill of lading without accepting the draft, he acquires no added right in the goods thereby; but since he is intrusted by Logan with the bill of lading, he might, by a sale of the goods to an innocent purchaser, confer a good title as against Logan. The safe course is to forward the bill of lading and draft to a third party, as a bank, with instructions to deliver the bill of lading to Dows only in case he accepts or pays the draft.

61. Unascertained goods. The following rules govern the courts in determining at what time the title in unascertained goods passes to the buyer under a contract to sell.

Rule 1. *Where there is a contract for the sale of described but unascertained goods, no property in the goods is transferred to the buyer until the described goods are ascertained and set apart for the contract with the consent of both parties.*

Exceptions. (1) There may be a contract of sale of a share in specific goods, and in that case the buyer becomes a tenant in common with the seller or owner of the remaining undivided portion. For example, Spinney purchases half the wheat in Hun's granary. Title to an undivided half interest in the wheat passes at once to Spinney. (2) There may be a sale of a definite quantity to be taken out of a definite mass of unknown size. This case differs from the first in that the sale is not of a certain share, as one half, but of a definite weight or measure out of a specific mass of unknown weight or measure, as 6000 bushels of wheat out of all the wheat in a bin, the total in the bin being unknown. The buyer becomes owner of that share represented by the ratio of 6000 to the total; if the total be 9000, then the buyer may take title to a two-thirds interest from the time of the making of the contract. Two remarks are to be made upon this exception. First, it applies only to what are called fungible goods, that is, goods like wheat, coal, and the like, where each unit (as, for example, each bushel or ton) is substantially like each other unit and of the same value, and not to goods having individual characteristics, like horses. Second, even as to fungible goods the exception has not been everywhere accepted, a few jurisdictions insisting that not even title to a share can pass in such cases until the 6000 bushels have been separated from the mass.

Rule 2. *Where there is a contract for the sale of unascertained goods by description, and goods of that description and in a state ready for delivery are unconditionally appropriated to the contract, either by the seller with the consent of the buyer or by the buyer with the consent of the seller, the property in the goods passes to the buyer at the time of such appropriation. Such consent may be expressed or implied and may be given either before or after the appropriation is made. The appropriation must be final and unconditional. If the seller may substitute other goods, it is not final. Appropriation means setting aside or fixing goods as the goods to be given to a buyer under a certain contract.*

Examples. 1. Ball orders of Liney 6000 tons of coal of a specific description, the same to be measured into freight cars on the siding at Liney's warehouse. Liney measures 6000 tons of the specified description into the cars. The title passes to Ball as soon as the appropriation is completed by putting the coal into the cars.

2. Maybee buys cloth of Tregent from sample. Tregent sets aside in his store goods corresponding with the sample, and marks them with Maybee's name. The goods are burned and Tregent sues Maybee for the price. If the appropriation was made by Tregent with Maybee's consent, the title passed and Maybee is liable. But if the appropriation was not final,—if Maybee had not consented to this form of appropriation,—the title was still in Tregent, and Maybee is not liable. This involves questions of fact to be determined in each case.

Rule 3. *An unconditional delivery of the goods to a carrier, as directed by the buyer, or as allowed by custom and usage, is always deemed a sufficient appropriation to transfer the title to the buyer; but a delivery by which a bill of lading is made to the order of the seller may not pass title. This is explained in Rule 6, sect. 60.*

Example 3. Gass orders of Astoria 6000 barrels of flour of a specified description. Astoria delivers to a railway carrier 6000 barrels of flour of this description billed to Gass, and sends Gass the bill of lading. The title passes to Gass as soon as the delivery to the carrier is complete. But if the bill of lading reads "deliverable to the order of Astoria," the title will not pass, because Astoria has thus reserved it in himself. Moreover, if the contract requires the seller to deliver the goods to the buyer at a particular place, the property will not pass until the goods have reached the place agreed upon. Thus, Gass orders of Astoria the flour as above, "to be delivered free of charge at Gass's warehouse in the city of Philadelphia." The title does not pass until the flour is in the specified warehouse.

Rule 4. *If goods are shipped to the buyer C.O.D. (cash on delivery), under the Uniform Sales Act and prevailing American rule title passes to the buyer at the time of delivery to the carrier. The seller is deemed to reserve by the C.O.D. clause only the right to possession until payment.*

Example 4. Davis ships to White a barrel of flour by express, with instructions to the express company to deliver the flour to White only on payment of the price and the express charges. The flour is lost in shipment. The title had passed on delivery to the express company, and White must bear the loss.

62. Who has the risk? Unless otherwise agreed, the goods remain at the seller's risk until the title passes to the buyer. As soon as the title passes to the buyer the goods are at the buyer's risk, whether he actually has possession or not. That risk follows title is the rule that prevails unless the parties agree to the contrary. In determining who has the title the rules given above are to be applied in the absence of an express agreement.

Exception. If the seller delivers the goods to the buyer, but by the terms of the sale retains title as security for the payment of purchase price, the goods are at the risk of the buyer. For example, Dunham purchases household goods of Pettee upon installment payments, and it is agreed that the title to the goods shall remain in Pettee until they are actually paid for. Dunham has the goods in his house, where they are accidentally destroyed by fire before they are paid for and before title has passed to Dunham. Dunham must pay for the goods; the risk is with him, although for security the title is with Pettee. It is the same as if title had passed to Dunham and he had then given Pettee a chattel mortgage on the goods as security.

He who has title also has the right to any gain or increase derived from the article. He who bears the risk and burden is also entitled to the benefits.

Example. Joyce purchases Adams's flock of sheep and leaves them in Adams's possession, delivery and payment to be later. Adams shears the wool. Joyce sues Adams for its value. Joyce may recover. The title passed to him and the wool is his. So if lambs are born of these sheep, they belong to Joyce. On the other hand, if any of the sheep die, the loss falls on Joyce.

III. Performance

63. Duties of the seller. The duties of the seller in performance of this contract may be briefly stated as follows:

1. It is the duty of the seller to deliver the goods in accordance with the terms of the contract. Whether he is to send them or the buyer is to call for them will depend upon the contract. If nothing is said about this matter, the place of delivery is ordinarily the seller's place of business or residence or the place where the goods are at the time of the sale. If no time for delivery is fixed, a reasonable time is understood.

Example 1. Johnson sells to Brown a hogshead of molasses which is in a warehouse belonging to Tompkins. The contract said nothing about place of delivery. Brown claims that Johnson must send the molasses to Brown's store. This is wrong. Brown must come to the warehouse and take the molasses.

2. It is the duty of the seller to deliver the quantity specified. If he delivers less, the buyer may reject the goods offered; if he delivers more, the buyer may take what he contracted for and reject the rest, or he may reject the whole. The buyer is not bound to accept delivery piecemeal, or in installments, unless he has agreed to do so.

3. It is the duty of the seller to deliver the quality and kind of goods agreed upon. The buyer must be allowed a reasonable opportunity to inspect the goods, if he did not inspect them when he purchased them; and the buyer is not deemed to have accepted the goods until he has had such opportunity of examining them in order to see if they conform to the contract. He is regarded as having accepted them when he so states to the seller, or exercises ownership over the goods, or retains them without complaint after the passage of a reasonable time. If the buyer rightfully rejects the goods, he is not bound to return them to the seller, but must permit the seller to take them.

Example 2. Dockery contracts to deliver to Henry 1000 bales of wool of a certain grade on or before July 1. On July 1 at 10 P.M. Dockery tenders the wool in a warehouse where there are no adequate lights. Dockery has not performed his duty to afford sufficient opportunity to inspect, and Henry may reject the wool.

4. It is the duty of the seller to pass to the buyer a good title to the goods.

5. It is the duty of the seller to make good all representations and warranties expressed or implied in the contract of sale. This is more fully explained under "Warranties" *post*.

64. Duties of the buyer. The duties of the buyer, after a contract of sale and purchase is made, are as follows:

1. It is the duty of the buyer to accept the goods. If he refuses to do so, the seller may sue for the price if title has passed to the buyer or if, although the title has not passed, the goods are not

readily resalable for a reasonable price; or the seller may sue for damages for the buyer's failure to accept the goods.

Example. Williams orders, and Browning agrees to make for Williams, 100 castings especially fitted for Williams's machinery and of peculiar design. When the castings are ready, Williams refuses to take them. Even though title has not passed, Browning can sue for the price, because the goods are not suitable for the general market and could not be sold except at a great sacrifice.

2. It is the duty of the buyer to pay for the goods. Unless otherwise agreed, delivery of the goods and payment of the price are to occur at the same time. If the price is agreed upon, that must be paid. If no price is agreed upon, a reasonable price, namely, the market price, is understood.

IV. Warranties

65. Definition and classification. A warranty is any representation of fact or promise by the seller to the buyer regarding the title, identity, or quality of the goods, the natural tendency of which is to induce the buyer to purchase, which does actually induce a purchase. The warranty is expressed if it is stated by the seller in written or spoken words. It is implied if, from the nature of the sale and the circumstances of the parties, the law believes it reasonable that a warranty was intended, although none was actually mentioned.

Examples. 1. Crocker buys goods of Shull, who assures Crocker (that is, warrants) that they have fast colors. This is an express warranty. It is not necessary to use the word "warrant" or "warranty." If the colors run, there is a breach of the warranty.

2. It turns out that Shull did not own the goods. There is a breach of the implied warranty of title which accompanies every sale of personal property.

3. Lewis orders of Doyle a quantity of goods by sample. There is an implied warranty that the goods when received shall correspond with the sample.

66. Express warranties. The express warranty is gathered from the terms of the contract. If the contract is in writing and clear, the construction is for the court. If the contract is oral, the con-

struction, unless too clear for any difference of opinion, is for the jury. If the contract is in writing, an oral express warranty cannot, save in very unusual cases, be added to it. If the seller first makes statements amounting to warranties, and then declares he will not warrant, there is no warranty. But his unexpressed intention not to warrant will not avail him if he uses words appropriate to a warranty. It is not his intention, but the impression reasonably produced upon the mind of the buyer by his words or conduct, that is the test.

The presence of an express warranty will not exclude an implied warranty unless the express warranty is inconsistent with the implied warranty.

General warranties of "soundness" and the like will not ordinarily cover specific defects obvious to the buyer, but they will cover defects about which a buyer expresses doubt after an examination. A particular warranty will cover a particular defect if intended to do so, although the defect may be open.

Expressions of opinion or "puffs" do not amount to warranties.

Examples. 1. Hoag in selling a horse says, "This horse is sound." There is visible a large bunch on the horse's leg. The warranty does not cover this defect, although it does cover other defects not obvious.

2. A buyer in looking at sheep thinks he has discovered foot rot. The seller assures him that he is mistaken and warrants the sheep to be sound. The general warranty covers foot rot.

3. "These sheep will shear from six to ten pounds of wool a head, and you can pay for the sheep from the wool in two years" is a mere statement of opinion, and the buyer should not rely upon it. So also the statement "This is an A No. 1 bond" is a mere "puff."

67. Implied warranties. The following are the principal implied warranties that are attached to a contract of sale.

1. *Warranty of title.* There is an implied warranty by the seller that he has a right to sell the goods, that the buyer shall have and enjoy quiet possession of them, and that they shall be free from any charge or encumbrance in favor of any third person,—in other words, a warranty of title. If this warranty is broken and the buyer is deprived of the goods, the buyer may recover, with interest, the purchase price paid.

Exceptions. This does not attach, however, to a sale made by a sheriff or other person who sells under authority of law, nor, in general, to a sale in which the seller undertakes to transfer only such property as he or the person he represents may have in the goods; as, for example, a sale by an assignee in bankruptcy, an administrator or executor, a trustee, or a mortgagee under a power of sale. But it does attach to the ordinary sales in the business world.

2. *Sale by description.* (1) In the sale of goods by description (that is sales in which the parties identify the goods by written or spoken descriptions of their character and quality) there is an implied warranty that the goods shall correspond with the description. (2) If the goods are bought by description from a seller who deals in goods of that description, there is an implied warranty that the goods shall be of merchantable quality (that is, salable as average goods of the kind described).

Examples. 1. Moore orders of King "early strap-leaf red-top turnip seed" for raising turnips for market. King furnishes seed, which Moore plants. The crop is late and fit only for cattle. No inspection of the seed by Moore could reveal that they did not correspond with the description. Moore has an action against King for breach of the implied warranty that the seed should correspond with the description. It is immaterial that King believed that the seed were of the kind ordered. Moore may recover as damages the difference between the market value of the crop raised and the market value of the one he would have raised had the seed he ordered been furnished.

2. Landreth orders ice of Wyckoff, an ice dealer, to be shipped from Maine to Boston. There is an implied warranty that the ice shall be of merchantable quality; but if Landreth has examined the ice before shipment, there is no implied warranty as to any defect which such examination ought to have revealed.

3. *Sale by sample.* In a sale by sample there is an implied warranty (1) that the goods to be delivered shall correspond with the sample in quality, and (2) that if the seller is a dealer in goods of that kind the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

Example 3. Meserole ordered of Luckes, a dealer in coatings, certain "corkscrew worsted coatings," to correspond in weight and quality with samples supplied Meserole. The cloth when made up into coats gave way

at the seams, owing to some defect in the manufacture. The goods corresponded with the sample, so there was no breach of that warranty; but they were unfit for the purpose to which such material is ordinarily put, and this was a breach of the warranty of merchantability. Meserole could not reasonably discover this defect from the sample, nor indeed from the goods until the cloth was actually made up into garments.

The buyer must be given a reasonable opportunity to compare the goods with the sample, and in sales by description he must have reasonable opportunity for inspection.

There may be in the same sale an implied warranty as to description and also as to sample. Such was the case in the example last given. The goods were to be "corkscrew worsted coatings" and were also to correspond with the sample.

4. *Fitness for particular purpose.* Where the buyer makes known to the seller the particular purpose for which such goods are required, relying upon the seller's skill or judgment to select suitable goods, there is an implied warranty that the goods shall be reasonably fit for such purpose, whether the seller is a grower or manufacturer of the goods or not.

Examples. 4. Fiss orders of Turl, a carriage maker and repairer, a new pole for his carriage. The pole breaks, owing to a defect, and the carriage is damaged. Turl is liable to Fiss for the damages. There is a breach of the implied warranty that the pole shall be reasonably fit for the purpose for which it was ordered.

5. Brisbane orders of Parsons, a manufacturer of cloths, a quantity of "indigo-blue cloth." Brisbane is a woolen merchant, but is not known to Parsons to be a tailor. Brisbane makes the cloth up into uniforms, and the cloth soon shows defects. There was no implied warranty that the cloth was fit for that purpose, because the purpose was unknown to the seller. There might be a breach of the implied warranty of merchantability, but this would depend upon other circumstances. Had the order been "indigo-blue cloth suitable for uniforms," there would have been an implied warranty of fitness.

6. *Exception:* A sale of a specified article under its patent or other trade name does not carry an implied warranty of fitness for any particular purpose. An order for "your Challenge auger outfit for boring wells" is fully complied with when the "Challenge auger outfit" is furnished. The contract assumes that the buyer knows what are the character and capacities of this article.

5. *Sale of provisions.* The above rules apply to the sale of food under the Uniform Sales Act. Under that act there are no special rules regarding warranties of food. But in most jurisdictions where the Uniform Sales Act is not in force there is a special implied warranty in the sale of food for human use, namely, that it is wholesome and fit for food. This is put on the ground of the preservation of health and life, and is applied even where the buyer sees and inspects the article before purchasing. Most courts which recognize this special warranty at all limit it to the case in which the buyer intends to eat the article and the seller knows this fact; but some extend it even to the case of a sale by a wholesaler to a retailer who intends to resell the article. In no case is the doctrine applied to the sale of food for animals.

Example 7. Bennett sells meat to Buchan, a retailer, who resells it to Mosely for eating at home. Under the Uniform Sales Act both Bennett and Buchan would be liable on an implied warranty of fitness for use as food. Some courts, not governed by the Uniform Sales Act, hold that there is an implied warranty of wholesomeness by Buchan but not by Bennett, because Buchan sold for immediate use on Mosely's table. If either Bennett or Buchan *knew* the meat was unwholesome, he would be liable in deceit for fraudulent concealment.

68. The rule of *caveat emptor*. The general rule in the law of sales is that of *caveat emptor*, "let the buyer beware." This is supposed to have the effect of making men self-reliant and cautious, and of decreasing litigation.

The exceptions to the rule are those stated under the head of implied warranties. In those cases the seller takes the risk instead of the buyer, and without any express statement. In all other cases, if the buyer does not wish to take the risk, he should ask for an express warranty.

69. Remedies for breach of warranty. Under the Uniform Sales Act and in a majority of the states the buyer may either rescind or cancel the sale for a breach of warranty, that is, return the goods and recover the price, if he has paid it, or he may keep the goods and sue for damages for the breach of the warranty. If the warranty is fraudulent, that is, if the seller knew it was false, the contract may everywhere be afterward rescinded for the fraud.

If the title has not passed to the buyer, he may refuse to receive the goods upon discovering a breach of the express warranty.

In order to rescind or cancel for breach of warranty, the buyer must act promptly or within a reasonable time. If the seller refuses to receive the goods upon a rescission, the buyer may hold them as bailee for the seller.

Examples. 1. Cook sells and delivers timber to Bushwell and innocently warrants it to be sound. Bushwell discovers that the timber is unsound, offers to return it, and demands back the purchase money. He then sues for the purchase money. In some states he will fail; he can recover only the difference in value between the timber as warranted and as it was in fact. In a majority of states and under the Uniform Sales Act he will succeed, upon returning the timber, in recovering the whole purchase money.

2. Cook makes the warranty, knowing that the timber is unsound. This is fraud, and Bushwell may cancel and recover the whole purchase price.

3. Birdseye sells Frost a truck which he innocently warrants to be new and sound, and agrees to repaint the wheels. Frost discovers the truck to be an old one and unsound. Frost may refuse to receive it, because the title has not yet passed to him.

4. Briggs orders rubber of Hilton by description. When the goods arrive, Briggs discovers that they do not answer the description. He may reject them or he may take them and sue for damages if he has paid the price, or deduct the damages from the price if it is yet unpaid.

5. (1) Vaughn orders of Stumpp a printing-press for newspaper work. Vaughn sets it up and finds it unfit for the purpose. Vaughn may reject it if he acts with promptness after such test, or he may keep it and sue for damages for breach of the implied warranty. (2) So if Vaughn orders a chemical, he may use enough of it to decide whether it answers the description; and if it does not, he may reject the remainder without being required to pay for what he has reasonably used in the test. (3) But if he can determine the quality without using any, he waives his right to reject the goods by using any portion of them.

6. The damages which can be recovered upon a breach are all the losses directly and naturally resulting from it. Carlton orders from the maker, Lombard, a refrigerator suitable for keeping dressed poultry. The refrigerator furnished by Lombard is not suitable for the purpose, and the poultry spoil. Carlton's damages include the difference between the value of the refrigerator ordered and the one delivered, and also the loss incurred by the spoiling of the contents. See also the case of the sale of the turnip seed, p. 97 *ante*.

JOHN MARSHALL (1755–1835)

A soldier of the Revolution who became a lawyer at Richmond, Virginia. He was for thirty-four years Chief Justice of the United States Supreme Court. He believed that the framers of the Constitution intended a strong Federal government. His decisions were especially influential in establishing firmly the government of the United States and interpreting wisely its Constitution

7. Bartlett orders from Hoppock a folding-bed. There is an implied warranty of fitness for use as a bed, and if the bed folds up on the occupant, Bartlett, he may recover not only the difference between the value of a safe bed and the value of that furnished, but also the consequential damages occasioned by the physical injuries caused by the breach of the warranty.

V. Remedies

70. Rights of unpaid seller against the goods. Although the title to the goods may have passed to the buyer, the seller who has not been paid is entitled to the following rights:

1. If the seller is still in possession of the goods, he has a lien on them, that is, a right to keep them until the price is paid, unless the seller has sold on credit and the term of credit has not passed.

2. If the seller has shipped the goods and he afterward learns of the insolvency of the buyer, he has the right to stop the goods while they are in transit before they reach the buyer, and thus regain possession of them.

3. If the seller has a lien or has stopped the goods while they are in transit, as above, (1) he may resell the goods in case the buyer delays an unreasonable time to pay for them, or at once if the goods are perishable; and if they sell for less than the buyer agreed to pay, the seller may recover from him as damages the difference between the price obtained and the price agreed to be paid; or (2) he may rescind or cancel the sale and transfer of title and may resume the title himself in case the buyer delays an unreasonable time to pay the price, and may also recover from the buyer as damages any loss occasioned by the buyer's failure to pay.

Seller's lien. The seller's lien exists when he has sold for cash down, or when, having sold on credit, the term of credit has passed before delivery, or when, having sold on credit, the buyer becomes insolvent before delivery. He loses his lien by delivery to the buyer or his agent, or by delivery to a carrier without reserving in the bill of lading the right to possession, or by a waiver of the lien. He cannot hold the goods for any claim except the purchase price, nor after valid tender of the purchase price by the buyer.

Stoppage in transit. Goods are in transit after delivery to a carrier and before delivery to the buyer, and may be stopped by

the unpaid seller in case the buyer becomes insolvent. The transit ends, however, if the carrier consents, after the arrival of the goods at their destination, to hold them for the buyer, or if the carrier wrongfully refuses to deliver them to the buyer upon demand. The unpaid seller exercises his right of stoppage in transit by giving reasonable notice to the carrier.[1] It is then the duty of the carrier to redeliver the goods to the seller, and the duty of the seller to pay the transportation charges. But if the carrier has issued a negotiable bill of lading, this must be surrendered or a sufficient bond be given to protect the carrier from any claim arising under it. If, however, such negotiable bill of lading has actually been transferred by way of sale to an innocent purchaser for value while the goods are in the hands of the carrier, and before the seller's right to stop has been exercised, his right of stoppage in transit is ended. But a sale of the goods by the buyer, where there is no such bill of lading outstanding, will not defeat the seller's right to stop.

Resale. The seller's right to resell the goods when he has stopped them in transit is exercised as agent by operation of law for the buyer. The purchaser at the resale gets a title good against the original buyer. Notice of the intention to resell need not necessarily be given to the buyer, but it is always safer to give it. Notice of the actual time and place of the resale need never be given to the original buyer.

Rescission. Notice of rescission or cancellation of the contract and retransfer of title to the seller, or some overt act showing an intention to rescind (as, for example, the use of the goods by the seller) is essential.

Examples. 1. Tuthill sold lumber to Skidmore and took Skidmore's note for thirty days. The lumber remained in Tuthill's possession. Skidmore sold the lumber to Greider. When Greider came for it, Tuthill refused to deliver it, because Skidmore had become insolvent. Tuthill was correct.

[1] "To the Illinois Central Railroad Co.: Circumstances having arisen which give to me the right of stoppage in transit, I hereby direct you to hold, subject to my orders, the goods delivered to you on Dec. 31, 1924, at Pana, Illinois, and consigned to Hubert Keil, Champaign, Illinois, and not to deliver the same to the consignee.

"Pana, Illinois, Jan. 5, 1925. CLARK SUTHERLAND"

Although a sale on credit waives a lien, the lien revives if the buyer becomes insolvent. Greider got no better right than his vendor Skidmore had.

2. Hayden sold tobacco to Demets, who, unknown to Hayden, was then insolvent. Hayden shipped the tobacco to Demets and sent Demets a bill of lading. Demets failed and transferred the bill of lading to McGibbon, his assignee in bankruptcy. Hayden then stopped the goods in the carrier's hands. McGibbon claims them. In this case Hayden will get the goods. An assignee in bankruptcy is not a purchaser for value, as he parts with nothing. But if Demets or McGibbon had sold and delivered the bill of lading to Bement before Hayden stopped the goods, Hayden's right would have been gone.

3. Goodman sold Decker a diamond for cash. Decker would not pay cash on delivery and Goodman retained the diamond. Afterward Goodman sold it to Bonnell for $40 less than Decker had agreed to give. Goodman may recover this $40 of Decker, provided he sold in good faith according to usage and for the highest price obtainable.

4. In the above case Goodman sold the diamond for $30 more than Decker had agreed to give. Decker claims this $30. (1) If Goodman sold as agent of Decker, he should account to Decker for the profits. (2) If Goodman rescinded the contract, the diamond became his and he is entitled to the higher price; but of course he has now suffered no damage for which he can sue Decker.

71. Rights of unpaid seller by way of action for breach of contract. The unpaid seller has the following remedies against the buyer who has broken his contract:

1. *Action for the price.* If the property in the goods has passed to the buyer, the seller may maintain an action for the price; so also if by the terms of the contract the price is to be paid before the property in the goods passes to the buyer, the seller may sue for the price when it is due. If the goods are not readily resalable at a reasonable price, the seller, upon offer to deliver them and refusal of the buyer to accept them, may hold them as bailee of the buyer and may maintain an action for the price.

2. *Action for damages for not accepting the goods.* If the buyer unreasonably refuses to accept the goods, the seller may maintain an action against him for damages for nonacceptance. The measure of damages is the loss to the seller. If there is an available market, the loss is the difference between the contract price and the market price of the goods.

Examples. 1. Francher sells Regan a wagon for $50, delivery and payment to be one week later. Title passes to Regan. If he refuses to take the wagon, Francher may sue and recover the price. Moreover, if Regan refuses to take the wagon, Francher may, according to some authorities, charge him for the storage and care of it.

2. Steinfeld agrees to build a wagon for Van Brocken according to a certain plan and description. When it is completed according to the contract, Steinfeld offers to deliver it to Van Brocken and the latter refuses it. (1) According to a few states Steinfeld's only remedy is damages for breach of contract, since no title has passed to Van Brocken and the wagon is still Steinfeld's. (2) But under the Uniform Sales Act and in a majority of the states Steinfeld may tender the wagon to Van Brocken; title will then pass, and Steinfeld may sue for the price.

72. Remedies of the buyer. The buyer may have become the owner of the goods or the title may not have passed. His remedies will be more numerous in the former case than in the latter.

1. *Remedies as owner.* If the property in the goods has passed to the buyer, and the seller wrongfully refuses to deliver the goods, the buyer may treat the seller as having appropriated them. This allows the buyer to replevin the goods, thus actually getting possession of them, or to sue in tort for conversion, thus getting their value in money.

2. *Action for damages for breach of contract.* If the property in the goods has not passed to the buyer, and the seller wrongfully refuses to deliver the goods, the buyer may maintain an action for damages for nondelivery. The measure of damages is the loss resulting naturally to the buyer. If there is a market, the measure is ordinarily the difference between the contract price and the market price of the goods at the time and place where delivery was due; these are called general damages. Damages may be increased, owing to the fact that the seller knows, at the time the contract is made, of the use to which the buyer intends to put the goods; these are called special damages.

Examples. 1. Sands purchases of Pollen 1000 bags of coffee at $8 a bag, to be delivered September 1. Pollen refuses to deliver on that date, and coffee is then $9 a bag in the same market. Sands's damages are $1 per bag, or $1000.

2. Griffin orders of Colver a shaft to replace a broken one in his mill, and notifies Colver that the mill must be idle until the shaft is delivered. Colver agrees to deliver it by a certain date, and fails to do so. Griffin may recover as special damages the loss resulting from the idleness of the mill while he is with due diligence procuring another shaft after Colver's failure to deliver at the appointed time. Without such notice to the seller Griffin's damages would be merely the difference between the price he agreed to pay Colver for the shaft and the price he is obliged reasonably to pay for one elsewhere.

3. Cassidy bought cotton goods of Lefevre, to be delivered January 15, informing Lefevre that he wished to put his salesmen on the road on that date with the goods. Lefevre delayed delivery and in consequence Cassidy's salesmen were idle for two weeks. Cassidy may recover the loss of profit on resales due to the delay of Lefevre. So if Cassidy, to Lefevre's knowledge, had resold the goods to Stecker, to be delivered January 20, and had to pay damages to Stecker for nondelivery, he could recover these damages from Lefevre. But these results occur only when Lefevre has express notice of the use to which Cassidy intends to put the goods and the contract is made in contemplation of that.

3. *Action for breach of warranty.* This has already been discussed (see section 69 *ante*).

REVIEW QUESTIONS AND PROBLEMS

52. Define contract of sale; executed sale; executory sale. What are goods? In what cases may a buyer get better title than the seller had? When not? Who is a purchaser in good faith and for value? Is an antecedent debt value? Distinguish sale and barter. How may the price be fixed? What is a bill of sale? Draw a bill of sale of a steam shovel and gasoline engine for $1700.

Problem 1. Cundy, in the name of Lindsay, orders goods of Little, who supplies them, supposing he is dealing with Lindsay. After Cundy gets the goods he sells them to Van Duzor, who has no knowledge of Cundy's trick. Little then brings an action to recover the goods from Van Duzor. Result?

Problem 2. Coggill is induced by fraud to sell and transfer goods to Ryall, whose creditors then seize the goods. Coggill seeks to recover the goods from the creditors. Can he do so?

Problem 3. In the above case Ryall pledges the goods to a creditor as security for a preëxisting debt. Can Coggill recover them?

53. What is the seventeenth section of the Statute of Frauds? What are "goods, wares, and merchandise"? Are choses in action goods? How can

you tell whether a contract is for the sale of goods or for work and labor? Is grass realty or personalty? What difference does it make? What constitutes acceptance and receipt? What is part payment? What should the note or memorandum contain? When may it be made? Write a contract of sale.

Problem 4. Lee agreed orally to make for Griffin a set of artificial teeth for $75, and Griffin agreed to pay Lee that sum. When the teeth were finished, Griffin refused to take them. Lee sues for the price. Griffin pleads the Statute of Frauds. Result?

Problem 5. Green orally agrees to cut and deliver to Armstrong, for the price of $15, certain trees standing on Green's land. Green refuses to perform, and when sued sets up the Statute of Frauds. Is Green in the right?

Problem 6. Cross examined barrel hoops at O'Donnell's factory and agreed orally to purchase a quantity for $200. Cross told O'Donnell to deliver them at the steamer *Curlew* for transportation. O'Donnell delivered them at the steamer. The *Curlew* was lost at sea with her cargo. O'Donnell sues Cross for the price. Cross sets up the Statute of Frauds. Were the goods "accepted and received" by Cross?

Problem 7. Brengeri bought a carriage of Beamont for $350, but it remained in Beamont's possession and there was no payment and no memorandum. Some changes were ordered, after which Brengeri inspected the carriage and approved it. Later Brengeri hired a team of horses and drove out in the carriage, but returned it to Beamont's warehouse. He then refused to take and pay for it. Beamont sues Brengeri, who pleads the Statute of Frauds. Result?

Problem 8. Scott goes into a store and buys on credit dress goods and trimmings amounting to $124. Among the purchases is a spool of thread at five cents. Scott takes the spool of thread home. Later she refuses to take the goods and pleads the Statute of Frauds. Result?

Problem 9. Howe and Hayward made an oral contract for the sale and purchase of goods of the value of $2500, and each deposited $200 in the hands of Meeson, to be forfeited by the party who should refuse to perform the contract. Howe refused to perform. Hayward sues Howe for breach, and Howe pleads the Statute of Frauds. Hayward replies that there was part payment. Result?

54. What are the remedies of the seller under a conditional sale if the buyer fails to pay money due? What are the rights of the buyer, if after he has made payments the seller retakes the goods for default? What is the effect of failure to file the contract?

Problem 10. Mills, an automobile dealer, sold a car to Thompson for $1750, of which $750 was paid in cash and the balance, $1000, was to be paid at the rate of $100 a month. The contract provided that Thompson

was to have possession and use of the car, but that title was not to pass to him until the full price was paid. After Thompson had paid all but $100 on the price, he failed to pay an installment on time. May Mills take back the car himself or have an officer of the law do so, there having been no clause in the contract about such retaking?

Problem 11. Vorse sold a corn-sheller to Whelchell and took notes for the price, the written agreement providing that Whelchell should become the owner of the machine only when the notes were paid. Before Whelchell had paid any of the notes and while he was using the sheller, Loomis, a sheriff, seized the sheller for the purpose of selling it to satisfy a debt from Whelchell to Wise. Vorse now sues Loomis to get back the sheller. The contract between Vorse and Whelchell was not filed in any public office, and Wise and Loomis both thought at the time Loomis seized the sheller that it belonged absolutely to Whelchell. What result?

55. What is the difference between the rights of the creditors of an agent selling goods on consignment and the creditors of a dealer who holds goods under a conditional-sale contract from the wholesaler?

Problem 12. De Mars, a retail piano dealer, ordered a piano from the Baldwin Company under a contract whereby he was to keep the instrument insured for the benefit of the company, was to put it in his stock and if he sold it remit the proceeds, less 20 per cent, to the company, and was to return the piano to the company at any time on demand. After receiving the piano De Mars mortgaged it to a money-lender, Van Arsdale, as security for a personal loan to De Mars. De Mars failed to repay the loan, Van Arsdale took the piano, and the company now seeks to get it from Van Arsdale. Who will succeed in this controversy?

56. What is the effect of putting goods into the hands of another under a trust receipt? May the creditors of the holder of the goods take them as against the holder of the trust receipt?

Problem 13. Cattus, desiring to buy and import certain hemp from Europe, made arrangements with the Merchants' Bank whereby the seller of the hemp in Europe was to draw drafts on the bank for the price, the bank was to accept the drafts, receive a bill of lading for the goods from the seller, and deliver this bill of lading to Cattus in return for a trust receipt by which Cattus agreed to hold the hemp for the bank, sell it, and pay the bank its advances out of the proceeds of the sale of the hemp. This arrangement was carried out and Cattus got the hemp from the vessel; but before he could sell it, he was adjudged a bankrupt. In a contest between the bank and the trustee in bankruptcy of Cattus, who succeeds?

57. What restrictions do the Sales-in-Bulk Statutes place on merchants?

Problem 14. One Karantzalis was a retail grocer in Newark, New Jersey, and owed Touris $400 for goods sold to Karantzalis by Touris. Karantzalis,

without the knowledge of Touris, or any notice to any other creditors, sold and delivered his entire stock of goods to Monahos for $700, $200 in cash and $500 in payment of a debt Karantzalis owed Monahos. Touris asks you whether he can set aside the sale to Monahos. What answer?

58. Tell how a railroad buys equipment under an equipment trust.

59. Why is it important to determine when title passes? What are specific goods? What are unascertained goods? Illustrate.

60. State the general rule as to when title passes in the sale of specific goods. State the six particular rules. Illustrate each.

Problem 15. Terry sold to Wheeler lumber which the parties culled out and agreed upon. Terry agreed to deliver it at the cars. There was a written memorandum. While still in Terry's yard the lumber burned. Terry sues Wheeler for the price. Did the title pass to Wheeler so as to make the loss his?

Problem 16. Sale of 119 specific bales of cotton at $31\frac{1}{4}$ cents a pound, payable cash on delivery, the cotton to be weighed and sampled before delivery. Seventy bales are weighed and sampled but not delivered, when the whole 119 bales are destroyed by fire. Is the buyer liable for the 119 bales? Is he liable for the 70 bales?

Problem 17. Sanger sells Waterbury 238 bags of coffee, marked and designated, but Sanger agrees to weigh the bags in order to ascertain the total price, the sale being by the pound. Has title passed to Waterbury?

61. State the rules to determine when title passes in the sale of unascertained goods. What are fungible goods? When is an appropriation final?

Problem 18. Hurff purchased of Hires 200 bushels of corn out of a lot of from 400 to 500 bushels in Hires's crib. It was to be left until it hardened, and then Hires was to measure and deliver it. Hires's creditors levied on the whole lot. Hires then delivered 200 bushels to Hurff, and the creditors seek to recover the corn from Hurff. Result?

Problem 19. In the above case the crib burns and all the corn is destroyed. Must Hurff pay Hires for the 200 bushels?

Problem 20. Assume, in Problems 18 and 19, that Hires has agreed to deliver the corn and that Hurff sues for breach of this promise. May he recover?

Problem 21. Krulder orders by mail a barrel of shellac of Ellison, who selects a barrel answering the description and ships it to Krulder by the Big Four Railway as directed. It is lost in transit. May Ellison maintain an action against the Big Four Railway for its loss?

Problem 22. In the above case Ellison took the bill of lading in his own name and retained it. Can Ellison sue the Big Four Railway for the loss?

62. Where is the risk of loss after a contract of sale? Where is the right to gain or increase? Do these rules apply to a sale and delivery when the seller retains title as security for payment?

63. State the duties of the seller. Where is delivery to be made? If the buyer orders 50 barrels of apples and the seller delivers 48 barrels, must the buyer take them? How is it if the seller delivers 55 barrels? If the seller delivers 50 barrels, what right has the buyer?

64. State the duties of the buyer.

65. Define warranty; express warranty; implied warranty.

66. Does an express warranty arise without words? Who determines whether there is an express warranty? What is the test? What is a "puff"?

Problem 23. Chapman sold a piano to Murchie. During the negotiations Chapman represented the piano to be in good condition. It was in bad repair. Murchie sues Chapman for breach of warranty. Chapman objects that he did not "warrant" the piano. Result?

67. State the implied warranties and when they occur. When is a warranty of title not implied? When is there a warranty that goods are merchantable? Is there a warranty of fitness for the purpose in a sale by a retailer? Is there any special implied warranty in the sale of provisions?

Problem 24. Eichholz stole a horse and had him sold at auction. Bannister bought at the auction and then resold the horse to Russell. The true owner traced it and recovered it from Russell, who now sues Bannister for breach of warranty of title. Result?

Problem 25. Salisbury sold Stainer 184 bales of hemp, and Stainer at the time of the sale inspected it before purchasing by opening several bales. Most of it later turned out to be bad. Stainer sues Salisbury for breach of implied warranty. Result?

Problem 26. Wieler ordered of Schillizzi "Calcutta linseed." It came mixed with rape and mustard seed. All linseed has some such seeds mixed with it; this had more than the usual quantity. Wieler contends that the contract is not satisfied by offering this article,—that it does not answer the description. How would you hold?

Problem 27. Dowdle bought of Bayer a carload of cedar posts, to be shipped by Bayer to Dowdle. When they arrived, Dowdle's servants unloaded a part of them and, discovering they were not of good quality, so informed Dowdle. The latter then inspected them and, because they were not of good quality, replaced them in the car and refused the whole lot. Bayer sues Dowdle for the price. Is Dowdle liable?

Problem 28. Gould bought of Stein by sample "102 bales second quality Ceara scrap rubber as per sample." When the bales arrived, they were found not to be second quality, but inferior, though they were like the

sample. Is Gould bound to keep the rubber and pay for it without offsetting the damages for breach of warranty?

Problem 29. 1. A manufacturer sells Brady powder for blasting. It is of poor quality and unfit for the purpose. Is there a breach of warranty?

2. A dealer who purchased of the manufacturer sold Bench some of the same powder for the same purpose. Is the dealer liable to Bench for breach of warranty?

68. What is meant by the rule of *caveat emptor*? What are the exceptions to the rule? If Garson sells Baldwin a horse without express warranty, is there any implied warranty? If Garson sells Baldwin seeds, is there any implied warranty?

69. Can the buyer rescind the contract for a breach of an express warranty if the title has passed? for breach of an implied warranty? If goods are ordered by description and they do not answer the description, may the buyer take them and sue for breach of implied warranty?

70. State all the rights of an unpaid seller against the goods. What is the seller's lien? How is it lost? What is the right of stoppage in transit? When may it be exercised? How is it lost? Explain the exercise of the right of resale; of rescission.

Problem 30. Dustan sells McAndrew a phonograph, payment and delivery to be one week later. At the time fixed McAndrew does not take or pay for the phonograph. Explain all the remedies to which Dustan may resort against the property itself.

Problem 31. Dustan sells McAndrew a peanut-roaster on credit, delivery to be one week later and payment one month later. What are Dustan's rights against the property?

71. State the seller's rights against the buyer. How does he measure his damages for a breach?

72. State the remedies of the buyer (1) where the title has passed and (2) where it has not passed. What are general and what are special damages? When may special damages be recovered?

CHAPTER V

BAILMENT OF GOODS

73. Definition and distinctions. A bailment[1] of goods is a transfer of the possession of goods without a transfer of the general ownership, upon a contract that after the purpose of the transfer has been accomplished, the goods shall be delivered back to the bailor or to some person named by him. Bailments are not concerned with land or other real property.

The person making the delivery is called the bailor. The person to whom it is made is called the bailee.

Such a transfer of possession usually occurs by delivery from the bailor to the bailee. It may take place, however, without such delivery.

Examples. Evans obtains possession of a typewriter from Babcock under a contract by virtue of which Evans is to pay $5 a month for the use of the machine and return it to Babcock at the end of three months. This is an ordinary bailment for hire in which Babcock is the bailor and Evans the bailee.

If one finds an article and takes charge of it, he is a bailee for the unknown owner, although there has been no delivery by the owner, and is under an obligation created by the law to return it to the true owner on demand. So if one steals property belonging to another, he is a bailee, and the law creates for him a promise to return it to the owner. So also a sheriff who seizes goods under a legal process is a bailee of the goods. In all these cases there is a transfer of possession without delivery, but in all of them the bailee is bound to deliver up the property either upon demand or when the purpose for which he has taken it is accomplished.

The duty of the bailee is usually fixed by his own promise and is therefore the result of contract. But in the cases last given there is no promise and no real contract. The law treats these cases on the theory that there is a promise; that is, the law creates the promise and requires the bailee to return the goods or pay damages for withholding them.

[1] "Bailment" is from the French *bailler*, "to deliver."

The consideration for the bailee's promise to pay money for the use of the goods and to return the goods is the detriment suffered by the bailor in parting with his property. Sometimes the bailor furnishes some other consideration, as when he pays or promises to pay the bailee for caring for the property or doing work upon it. But in the case of a gratuitous bailee (one who cares for the goods without compensation) the only consideration is the parting with the property by the bailor. This is an act which the owner is not legally bound to do, and is therefore a sufficient consideration.

Bailment applies only to personal property. This may be corporeal, as a horse, or incorporeal, as a draft or bill of lading.

The bailor need not be the full owner of the property. One may hire a horse and put him in a livery stable; in such a case there are two bailments,—by the owner to the hirer and by the hirer to the livery-stable keeper. One who finds a jewel may deliver it to a jeweler to be tested; in such a case the finder is bailor and the jeweler is bailee, and the finder may recover the jewel, or its value, if the jeweler refuses to surrender it. The bailee cannot dispute his bailor's title.

Distinctions. A bailment must be distinguished from a sale or barter.

A bailment differs from a sale in this: in a sale there is a transfer of the general ownership or title, while in a bailment there is the transfer of possession for a particular purpose, the general ownership or title remaining in the bailor.

A bailment differs from a barter for the same reason. Furthermore, in a bailment the identical thing is to be returned, though sometimes in an altered form, while in a barter some other thing is to be returned. If one delivers grain to be ground into meal and the meal returned, this is a bailment; but if one takes his grain to a mill and receives therefor meal already ground, this is a barter, or sale. If one "lends" his neighbor a bag of oats to feed the neighbor's horse, this is a barter, because the same oats are not to be returned, but a like quantity of oats.

Sometimes there is a bailment with an option to purchase, as where there is a "sale on approval" (see page 90 *ante*). In such case the transaction becomes a sale when the bailee gives his approval to keeping the goods permanently.

Sometimes there is a bailment with permission to mix the goods with others of a like kind, as where grain is placed in an elevator with the grain belonging to other bailors. The owners of the grain become owners in common of the mass of grain, according to their respective shares. If there

is no such permission, express or implied, the bailee must keep the bailor's goods separate from his own or others'.

74. Classification of bailments. Bailments fall into two classes, and each has subdivisions. The two classes are (1) bailments solely for the benefit of one party and (2) bailments for the mutual benefit of both parties.

1. Bailments solely for the benefit of one party are divided into two classes.

a. Bailments for the sole benefit of the bailor are either bailments in which the bailee, without compensation, is to keep the property of the bailor for him, or bailments in which the bailee, without compensation, is to do something to or about the property for the bailor's benefit.

Examples. Quimby undertakes without pay to keep Pound's jewels. Quimby without pay undertakes to repair Pound's watch. Quimby without pay undertakes to carry Pound's grist to mill. These are all bailments for the sole benefit of the bailor.

b. A bailment for the sole benefit of the bailee is one in which the bailor without compensation allows the bailee to use his property.

Examples. Lake lends Lyttle a jewel to wear, or Lake lends Lyttle his horse to drive, without pay.

2. Mutual-benefit bailments may be divided into three classes, with two additional special classes.

a. The delivery of a chattel as security for the payment of a debt. This is called a pawn or pledge, or giving of collateral security.

Examples. Bancroft borrows money of Butler and delivers his watch to Butler as security. Bancroft borrows money of a bank and delivers bonds or shares of stock as collateral security for the payment of the debt.

b. The delivery of goods to the bailee to be used by him and such use paid for. This is like the second case given above, except that the bailee is to compensate the bailor.

Examples. Lake lends a jewel to Lyttle to wear, or Lake lends his horse to Lyttle to drive, in each case for an agreed price.

c. The delivery of goods to the bailee to keep safely, or to do work upon, for a compensation. This is like the first case given above, except that the bailee is to be paid instead of acting without charge.

Examples. Quimby undertakes for a price to keep Pound's jewels safely. Quimby for a price undertakes to repair Pound's watch. Quimby for a price undertakes to carry Pound's grain to mill.

The following special cases of delivery for safe-keeping or for transportation fall under mutual-benefit bailments but call for separate treatment.

(1) Hotel keepers. The intrusting of goods to the protection of a hotel keeper by a guest at the hotel gives rise to peculiar liabilities on the part of the hotel keeper.

(2) Common carriers. The delivery of goods by a shipper to a common carrier for transportation gives rise to peculiar liabilities on the part of the common carrier. What is a common carrier will be explained later.

The following special cases do not fall strictly under bailment but may be treated here for convenience.

(1) Public carriers of passengers and baggage.

(2) Telegraph and telephone companies.

I. Bailments Solely for Benefit of One Party

75. Bailments for sole benefit of bailor. These bailments lay on the bailee the lightest duties, since he derives no benefit from them.

1. *How created.* This bailment may be created by contract, as where, upon the bailee's promise to care for a watch gratuitously, the bailor delivers the watch to the bailee.

This bailment may also be created by a voluntary undertaking of the bailee without any action on the part of the bailor, as, for example, where one finds lost property and takes it into his possession.

It may also be created without a voluntary undertaking of the bailee, as where goods are cast by a flood upon the lands of the bailee.

2. *Bailor's obligations.* As these are gratuitous bailments, the bailor is not bound to pay the bailee for his services in the care of the property or for any work done upon it; but if the bailee has not by agreement undertaken to bear unusual expenses, the bailor must pay him for such actual expenses. The voluntary bailor is also bound to warn the bailee of any danger in connection with the bailed goods of which the former knows, if such danger increases the ordinary risk of the bailment and is not apparent to the bailee.

Examples. 1. Pierce undertakes without pay to keep and feed Amory's dog. Pierce is obliged to pay a dog tax. Amory must reimburse Pierce.

2. Pierce undertakes without pay to take and care for Amory's dog. Known to Amory but unknown to Pierce, the dog is vicious. Pierce is bitten by the dog. Amory is liable to Pierce for the injury. But Amory would not be liable if he did not know of the dangerous character of his dog or if he warned Pierce of it.

3. *Duties of bailee.* The bailee is not bound to go on with the bailment even after he has promised to do so. This is because there is no consideration for his promise, since the bailor has promised him nothing in return. But if the bailee does undertake the bailment by receiving the goods, he then comes under certain obligations to the bailor.

a. The bailee must not by carelessness injure, destroy, or lose the goods. It is said that since the bailee is acting free of charge, he is bound to use only slight care toward the subject of the bailment and is liable only for gross carelessness. Whatever this may mean,—and it is a matter difficult to define accurately,—it is clear that less care is demanded of the gratuitous bailee than of any other. The amount of care must, however, vary in proportion to the risk.

Example 3. More care would be required in the keeping of a diamond than in the keeping of a plow; more skill and care would be required in the repairing of a watch than in the repairing of an umbrella. The court instructs the jury that the gratuitous bailee is required to use only slight care and is liable only for extraordinary carelessness, that this is the care that persons of less than ordinary prudence, but still of prudence, exercise under like circumstances, and that whether the bailee exercised this care in the particular case is a question of fact for the jury to determine.

b. The bailee must not use the article except so far as its use is reasonable or necessary for its proper care. The bailee might drive a horse to keep it in health, or milk a cow; but he could not use the horse for plowing his own field, or wear a diamond intrusted to him.

c. The bailee must deliver back the article at the end of the bailment, together with any increase or profit derived from it. If it has been lost, the bailee is liable only if the loss was due to his extraordinary carelessness.

Examples. 4. Mrs. Hill undertakes gratuitously to keep Mrs. Magee's furs. She keeps them so negligently that the moths injure them. Mrs. Hill is not liable unless this is found to be extraordinary carelessness.

5. Mrs. Hill wears the furs and loses them. Mrs. Hill is liable. She had no right to use the furs, and in doing so assumed the entire risk of their safety.

6. Newby undertakes gratuitously to keep Talbot's jewels. Newby locks them up in his desk. Burglars break open the desk and steal the jewels. Newby is not liable unless he was grossly careless, which could hardly be the case under these facts.

7. Newby leaves the jewels in an unlocked drawer and they are stolen. This might be gross carelessness.

4. *Ending of bailment.* The bailment is ended whenever either party elects to end it. This is perhaps subject to the qualification that if the bailee has entered upon some work to be done upon the article, he is bound to finish it. The death of either party ends the bailment. So also does the insanity of either.

76. Bailments for bailee's sole benefit. These bailments lay on the bailee the heaviest duties, since he alone benefits from such bailments.

1. *How created.* This form of bailment arises only by contract, because it requires the consent of the bailor to lend and the consent of the bailee to borrow. A promise to lend is not binding, because there is no consideration for it; but after the loan is made, the contract is complete. The absence of compensation to the bailor is always found in this class of bailments.

2. *Obligations of bailor.* The sole duty of the bailor is to warn the borrower of any defect in the goods, known to him and not

known or obvious to the bailee, which renders the goods dangerous. If he does not warn, and the bailee is injured in consequence of such defect, the bailor is liable to him for the injury.

Example 1. Clark lends his horse to Bamwell to drive. Known to Clark but unknown to Bamwell, the horse is a runaway. If Clark does not warn Bamwell of this, and the horse runs away and injures Bamwell, Clark is liable.

3. *Duties of the bailee.* The duties of a bailee may be fixed by the contract itself. Where they are not specified, the following duties will be implied.

a. The bailee must exercise great care in keeping or using the article, and is liable for slight carelessness. The bailment being for the bailee's benefit alone, the law exacts of him greater care than in the case of any other bailee. He is not liable for inevitable accident but only for such injuries as by the exercise of great diligence he could have prevented. In the presence of any danger he ought to prefer the safety of the borrowed article to the safety of his own property. In this respect this bailment is at the opposite extreme from the one for the bailor's sole benefit.

Example 2. Hubert lends Lamb his watch. Lamb loses it. If this was due to a want of great care (more than one ordinarily takes of his own property), Lamb is liable to Hubert. This is a question for the jury under proper instructions.

b. The bailee may, of course, use the article, but he must not lend it to others unless it is understood that he may do so, and must use it in accordance with the contract. Any material change in the use agreed upon may cast upon the bailee absolute liability for the safety of the goods or may render him liable in tort for appropriating the goods to his own use.

Examples. 3. Roberts borrows Riley's horse to drive to Pittsburgh, and drives instead to Erie in another direction. The horse dies without Roberts's fault. Roberts must pay for the horse. He has converted or misappropriated it and is absolutely liable. If the horse had died without Roberts's fault while he was driving to Pittsburgh, he would not have been liable.

4. Roberts borrows Riley's car to drive and permits Hoadley to drive it. Roberts is absolutely liable for any injury to the car while in Hoadley's hands. But it may be implied that another is to use the article. If

Roberts takes Riley's car in order to try it before buying, Roberts may permit an experienced mechanic to make the test.

c. The bailee must deliver back the article with its increase or profits. He cannot deny his bailor's title; that is, he cannot hold the article under a claim that it is his or belongs to someone else, but must return it and start an action to establish his claim.

Examples. 5. Henline borrows Mitchell's bonds to pledge in order to raise money. Henline must return the bonds and also any income which the bonds produced during the loan.

6. Racer borrows Sager's baby carriage and refuses to return it, claiming that it belongs to his wife, a sister of Sager. This is not a good defense. Racer must return the carriage, and the wife can then bring an action to recover it. Racer cannot thus dispute his bailor's title.

4. *Ending of bailment.* A bailment in the nature of a loan may be terminated at the will of the borrower. If the bailment be for a definite time, the lender may take back the goods before the time has elapsed. Any violation of the borrower's duty toward the article justifies the lender in recalling it. The death of the borrower, or his insanity, ends the bailment. The death or insanity of the lender does not terminate a loan for a definite period if that period has not yet passed.

II. Mutual-Benefit Bailments

77. Pledge or pawn. This is a mutual-benefit bailment intended as a kind of security; and when it is a bank transaction with stocks, bonds, or other like documents pledged, it is called collateral security.

1. *How created.* A pledge or pawn is a bailment of a chattel as security for the payment of a debt or the performance of another legal obligation, and is usually accompanied by a power in the bailee to sell the article in case the pledgor does not pay or perform. When a transaction is on a larger scale, the bailment is often called the giving of collateral security, as where one borrows money at a bank and deposits bonds as security for the payment of the loan. These pledges can arise only by contract. The statutes generally regulate somewhat strictly the business of pawn-

brokers, and prescribe the rate of interest[1] they may lawfully charge for loans secured by pledge. Delivery of the goods to the pledgee (the party receiving security) is essential to the creation of a pledge. The delivery of documents of title, like warehouse receipts or bills of lading, constitutes a pledge of the property they represent. Stock certificates when pledged should be accompanied by a power to the pledgee to transfer the title upon the books of the corporation that issued them.

2. *Rights and obligations of pledgor.* A pledgor (party giving security) of property impliedly warrants that he has good title to it and is liable to the pledgee for a breach of this warranty if the pledgee is damaged because the pledgor did not own the goods pledged. The pledgor has a right to transfer to another his interest in the pledged article, that is, the difference between its value and the sum for which it is pledged. He has a right to redeem the pledge by payment to the pledgee of the debt which it secures. No agreement of the parties can prevent the pledgor from redeeming, because a pledge which cannot be redeemed is regarded by the law as oppressive to the debtor, who usually gives a pledge because he is forced to it by financial distress.

3. *Rights and duties of pledgee.* The pledgee has a right to assign his interest in the pledge. He has no right to use the pledged article except so far as its use is necessary to its proper care. Any profits derived from it the pledgee holds to apply toward the debt; but if the debt is otherwise paid, he must account for the profits to the pledgor. He is to be paid by the pledgor for any expenses necessarily incurred in caring for the article pledged. The pledgee must use ordinary care in keeping and preserving the property, and is liable for ordinary carelessness. This case lies midway in this respect between the bailment for the bailor's sole benefit and that for the bailee's sole benefit. He must deliver back the property when the pledge is redeemed by the pledgor.

After the debt is due and unpaid, the pledgee may sell the property to pay the debt, and must pay to the pledgor any surplus above the debt, interest, and expenses of sale. If there is no

[1] The most common provision is 3 per cent a month. In a few states the amount runs as high as 10 per cent a month.

provision in the contract permitting a private sale, the sale must be at public auction after due notice to the pledgor; but it is often held that stocks and bonds may, after due notice, be sold on the floor of the stock exchange. The pledgee cannot purchase at his own sale. In the absence of an express provision in the contract fixing the method of sale, and especially where notice cannot be given to the pledgor, or where there are conflicting claims, it is safer for the pledgee to secure a sale by order of court under a decree of a court of equity. In some states statutes provide for the manner of sale of pledged property.

4. *Ending of pledge.* A pledge is terminated when the property is delivered back to the pledgor, or when by offer of payment or payment of the debt the pledgor is entitled to have it delivered back. A refusal to deliver back the property when the pledgor is entitled to it renders the pledgee liable in tort for misappropriation.

Examples. 1. Woodward pledges a jewel to Hall as security for a loan. Hall leaves the jewel at night in a show case. Burglars enter and take it. Hall is liable to Woodward for the loss if it is found that Hall did not use due or ordinary care for the safe-keeping of the jewel. Due care might require Hall to put the jewel in a safe.

2. Hall wears the jewel and it is lost. Hall is liable to Woodward, for he assumed the risk in wearing the jewel.

3. Owen pledged corporate stocks to a bank for the payment of a particular loan. Owen paid the loan and demanded the securities. The bank refused to deliver them and claimed to hold them for another unsecured loan of Owen. Owen brought an action against the bank for misappropriation of the securities and recovered. The bank could hold the securities for the particular loan, but for no other.

4. The bank received dividends on the securities. These belong to Owen after he pays the loan, or they may be deducted from the loan and payment made of the balance.

5. Owen received dividends on the securities. He holds them in trust for the bank until the loan is paid.

6. A pledgee upon default sold the pledged goods under authority given by the pledgor and purchased at his own sale. The sale may be set aside at the option of the pledgor.

78. Bailee hires an article of bailor. This is also a mutual-benefit bailment, since both parties obtain a benefit from it.

1. *How created.* This bailment arises only by contract. The bailor agrees to deliver to the bailee an article to be used by the bailee, who in turn agrees to pay the bailor a compensation for such use. If the bailor refuses to deliver or the bailee to receive the goods, there is a breach of contract for which damages may be recovered. When a delivery of the goods is actually made and accepted, the bailment begins.

2. *Rights and liabilities of bailor.* The bailor warrants that his title is good and warrants that the bailee shall not be disturbed in his possession by one having a superior title. He must warn the bailee of any defects, known to him and not capable of being observed by the bailee, which render the article dangerous for the purpose for which it is hired. So also the bailor must use due care to discover and remedy defects.

Example 1. Stearns lets to Marsh a horse and carriage, and the carriage breaks down and injures Marsh from a defect which, by the use of due care, Stearns might have discovered. Stearns is liable to Marsh.

3. *Rights and duties of bailee.* The rights and duties of the bailee may be fixed in part by the contract. In the absence of contract provisions the following general rules would govern.

a. The bailee must exercise ordinary care in the keeping and use of the article, and is liable for ordinary negligence. Ordinary care is that which the average prudent man exercises under like circumstances in the conduct of his own business. The bailee is not liable for inevitable accident or for any willful act of a third person. He is liable only for negligence; that is, that want of ordinary care on his part which naturally and probably results in injuring the article.

b. The bailee acquires the right to the exclusive use of the article during the period of the bailment. He may maintain an action for any disturbance of his lawful possession and is said to have a special property in the goods bailed to him. He must use the article with due care and only for the purpose or in the manner agreed upon. If he hires an automobile to drive to Jonesville, he must not drive elsewhere or beyond Jonesville. An intentional material variation from the terms of the contract may amount to

a conversion or misappropriation and render the bailee absolutely liable for the safe return of the car.

Examples. 2. Sharpe hires Moakley's horse to drive to San Mateo. He does drive to San Mateo, but by a very roundabout and unusual route. This may be a conversion or misappropriation and render Sharpe liable for any injury to the horse while so converted.

3. Sharpe overdrives the horse and injures it. He is liable to Moakley for want of care in using the horse.

c. The bailee is liable to persons other than the bailor for injuries resulting to them from his use of the article. The bailor is not liable for such injuries unless for some inherent defect or danger in the article, of which he did not warn the bailee. Third persons injuring the article are liable to the bailor for the injury to his interest in the goods and to the bailee for the injury to his interest in the goods.

Examples. 4. Marsh hires Haskell's motor cycle. Marsh drives so negligently that he injures Donnell. Marsh is liable to Donnell. Haskell is not liable to Donnell.

5. Marshall drives into the motor cycle and injures it. Marshall is liable to Marsh to the extent that the injury renders the motor cycle less valuable to Marsh, and to Haskell for any permanent injury to the motor cycle.

d. The bailee is bound to pay the bailor. If the price is not fixed by agreement, a reasonable price is understood. If the goods bailed are destroyed without fault of either party before the term of the bailment is completed, the contract is discharged, but the bailor may recover the reasonable value of such use as the bailee has had up to that time.

e. The bailee must deliver back the goods at the end of the bailment, and must pay for any damage done to them by his carelessness. If the bailee converts or appropriates the goods and the bailor recovers their full value, the absolute title vests in the bailee upon such payment to the bailor.

Example 6. Spalding hires Sewell's wagon for two days. At the end of two days Sewell demands it and Spalding refuses to return it. (1) Sewell may replevin it; that is, get it by legal process. (2) Sewell may sue Spalding for conversion and get a judgment for the full value of the wagon. When Spalding pays this judgment, the title to the wagon vests in Spalding.

79. Bailor engages bailee to keep, repair, or transport an article. In these bailments there is always a contract under which the bailee is to perform some services upon the goods for a compensation.

1. *Different bailments under this head.* These bailments are of various kinds and for various purposes. There are three distinct types: (1) where the bailee for hire is to take care of the goods for the bailor, as a warehouseman stores and cares for the goods of his customer, or a hotel keeper those of his guest; (2) where the bailee, for hire, is to do some work upon the article, as a jeweler repairs a watch or a miller grinds grain; (3) where the bailee is to carry or transport goods for the bailor for a compensation, as railways carry freight or postal authorities carry letters.

The cases of hotel keepers and common carriers present peculiar features and will be treated separately.

2. *Duties of bailor.* In addition to the duties of bailors in other relations the bailor in this class is under a duty to pay the bailee. That the bailee receives a compensation is the distinctive characteristic of these bailments. The compensation may be slight, but if there is any it serves to take the case out of the class of gratuitous bailments. Thus, if Baker agrees to take and care for Call's typewriter upon consideration that he (Baker) may use it, Baker is a bailee for hire and is not a bailee without compensation; he receives the use of the typewriter as compensation.

Usually the compensation is fixed by the contract or it is understood that it shall be the reasonable value of the bailee's services. When the bailee has fully performed his contract, he is entitled to his compensation, even though, before the article is returned to the bailor, it is destroyed, provided the destruction is due to no fault of the bailee. If the article is destroyed without his fault after he has partly performed but before his contract is completed, he is entitled to compensation for labor or material furnished up to the time of the destruction of the article. If the bailee abandons the work without good reason, many courts forbid him to recover any compensation, but some permit a recovery for the services less the damages to the bailor arising from the breach. So, if the bailee does the work unskillfully, but it is of some value, he may recover its value less the damages to the bailor.

Examples. 1. Schouler runs a store. He permits packages to be left there to be taken by a local expressman. A package for Story is left there to be taken by the expressman, and when called for cannot be found. Story sues Schouler, who argues that he was a gratuitious bailee and liable only for extraordinary carelessness. The judge tells the jury that Schouler is not a bailee for hire unless he is to receive some certain benefit,—that an uncertain, possible benefit in drawing custom to his store is not enough. On appeal the court held that this was an erroneous charge. The nature and amount of compensation are immaterial. The law will not inquire whether it is adequate, nor in such a case whether it is certain. It is enough that Schouler derives some compensation. (But note that in this case Story is under no obligation to pay Schouler anything.)

2. Wilkins agrees to work as bailee on Peck's table. After beginning the work, but before completing it, he stops and refuses to go on. Can he recover anything? Many courts say he cannot, because he has committed a breach of contract. Some allow him to recover the reasonable value of his services on the table, less the damages to the bailor from delay in the completion of the work.

3. *Rights and duties of bailee.* These are often regulated, at least in part, by contract. Where the contract is silent, the following rules apply.

a. The bailee is bound to exercise ordinary care and diligence and is liable for ordinary carelessness, but the standard of liability is different in the case of hotel keepers and common carriers. If the bailee undertakes to perform work requiring skill, as in the case of a watch repairer, he is bound to possess and exercise the skill ordinarily possessed by those engaged in that occupation.

b. The bailee has a temporary, special property in the goods, and may protect this by insuring his interest and by an action at law against persons who interfere with his possession.

c. The bailee has a lien upon the goods for his reasonable charges for storage or for services. A lien is a right to hold possession of the goods until the debt is paid. The only bailees in this class who had no lien at common law were persons who pastured cattle, and livery-stable keepers who cared for and fed animals, but statutes have generally extended the lien in favor of these bailees. Garage keepers now usually have a lien upon cars stored with them for charges for storage, gasoline, oil, repairs, etc. At common law the lien merely entitled the one having the lien to hold the goods and

was accompanied by no power to sell, but the power of sale to enforce the lien is now quite generally conferred by statute.

Warehousemen. A warehouseman is one who receives and stores goods for compensation. The warehouseman usually gives a "warehouse receipt" for goods received by him. These receipts may be transferred by delivery of the receipt or delivery and indorsement or mere indorsement so as to give the transferee or indorsee a right, upon presenting the receipt, to claim the goods. Whether indorsement is necessary or allowable depends on the terms of the receipt, that is, whether it provides for the delivery of the

All loss by fire, water, leakage, breakage, frost, or to perishable property at owner's risk.

No. 1190 9 & 11 SOUTHAMPTON STREET.

UTICA COLD STORAGE COMPANY

HOOK & SEAMAN, Proprietors,

Lot No. 3220 *Utica, N. Y.,* April 6, 1925

Received *from* Orrin D. Black, one truck load of household goods

On storage subject to his *order on payment of all charges and in accordance with the marginal note hereon endorsed.*

Storage ——— *per Season.* UTICA COLD STORAGE COMPANY.

Storage $10 *per month.* per M.C.M.

WAREHOUSE RECEIPT

goods to bailor alone or to the bailor or his order. Grain stored in warehouses is transferred by merely indorsing and transferring the warehouse receipts. Usually such grain is mixed with like grain of other bailors, and the receipt entitles the owner to the specified number of bushels from the common mass. In the absence of contract or custom the bailee has no right to confuse the bailor's goods with those of others; and if he does so and loss ensues, he must make good the loss. If he confuses a bailor's goods with his own, he will suffer whatever loss or inconvenience arises, even to the extent of losing his own goods altogether. If the goods are injured or lost, it is the duty of the warehouseman to explain the injury or loss. If the warehouseman proves that the goods have been stolen or burned while he was in possession, the courts differ as to the burden of proof, some holding that the warehouseman must prove that he was not to blame for the theft or fire, while other courts put the burden on the

bailor of proving that the warehouseman's negligence or willful act was the cause of the fire or theft. The rights and duties of warehousemen and their bailors and the transfer of warehouse receipts are now regulated by the Uniform Warehouse Receipts Act in all jurisdictions except Georgia, Hawaii, Kentucky, New Hampshire, and South Carolina. Except in California, Colorado, and Vermont the Uniform Act gives warehouse receipts a limited degree of negotiability only. It enables one intrusted with a receipt running to his order, or indorsed in blank, or running to bearer, to pass good title to the receipt to a bona fide purchaser of it, but the Uniform Act does not allow a thief or finder to pass title to the document. In the three states named above even a thief or finder can pass good title to an innocent purchaser for value. United States bonded warehouses are regulated by statute (United States Statutes Annotated (2d. ed.), sects. 2954–3008). They are for the convenience of importers or others required to pay duties or excise taxes, and goods are kept in them in bond until such taxes are paid.

Wharfingers. Wharfingers are warehousemen who maintain wharves for the purpose of receiving goods and keeping them for compensation.

Safe-deposit companies. If one rents a safe-deposit box in a bank or in the vaults of a safe-deposit company, is the bank, or the company, a bailee of the articles stored in the box? Probably not, in the ordinary sense of that term. The company never has possession of the contents of the box. The one who hires the box puts the articles in it, locks it, and keeps the key. The company, for added security, has another key, without the use of which the box cannot again be opened. Neither key alone will open the box; both must be used. The situation is like bailment, but does not fully correspond to it. The company is liable for breach of contract in permitting any unauthorized person to open the box, and is bound to use due diligence to guard the box and its contents. While the courts sometimes speak of these transactions as bailments, there is a material difference between them and ordinary bailments in that there is no actual delivery of the goods to the company.

Banks. When money is deposited in a bank, the relation is that of debtor and creditor, not that of bailor and bailee. One may, however, make a deposit as bailor. Such would be the case where one deposits a bag of gold, the same identical money to be returned to him.

III. Special Cases of Bailment for Keeping or Transportation

80. Innkeepers. The legal relation of a hotel keeper to his guests, and particularly toward the goods of his guests, is peculiar and is the result of conditions of life many years ago.

1. *Who are innkeepers.* An innkeeper or hotel keeper is one who holds himself out to the public as ready to entertain travelers as guests for a compensation, furnishing food and lodging or lodging alone. A restaurant is not an inn, because it furnishes only food. A lodging-house is not an inn, because the keeper is not bound to entertain any persons who apply, and makes a special contract with each. A hotel keeper, as to some of his permanent guests, may be rather a lodging-house keeper or a boarding-house keeper than strictly an innkeeper. A steamer providing lodging and food for passengers is not generally regarded, as to those so entertained, as a floating inn. A sleeping-car is not generally held to be an inn.

2. *Who are guests.* A guest at an inn or hotel is a traveler who receives accommodations therein under a contract, express or implied, with the proprietor. One who lives regularly or permanently at a hotel is not a guest in the legal sense of the term but is rather a lodger; but one may engage accommodations for a definite period, longer or shorter, without ceasing to be a guest, provided he is still a wayfarer or traveler and not a resident. The taking of lodgings is not necessary to make the patron a guest. A traveler who resorts to an inn for food or drink may be a guest. He may even, by his conduct at the railway station, become a guest of the innkeeper at the railway station and there put his baggage in charge of the hotel porter.

Examples. 1. Beale's family reside in Chicago, but Beale lives in St. Louis and visits Chicago only occasionally. The family engage permanent accommodations at a hotel. Beale visits them there and remains at the hotel for a month. Beale's watch and his wife's jewels are stolen without the fault of the innkeeper. Beale is a guest and the innkeeper is liable to him for the loss of the watch. His wife is not a guest but is a lodger and cannot recover for her jewelry.

2. Beale goes to a hotel and registers, but does not take a room. He goes to the dining-room, leaving his hand bag in the custody of a porter. It is stolen. The innkeeper is liable.

3. *Rights and duties of an innkeeper.* These differ in several particulars from those of other bailees.

a. An innkeeper is bound to receive all fit and orderly guests if he has rooms for them. His refusal to do so may make him liable

to an action for damages, or to a criminal prosecution, or both. Ordinary bailees may choose with whom they will deal, but an innkeeper is following a public calling and must serve all members of the public alike. The innkeeper must receive the baggage of the traveler also.

b. At common law an innkeeper is absolutely liable for the loss of his guest's goods in the inn, unless such loss was due to an act of God (for example, flood or tornado), to an act of the public enemy (as, for example, a hostile army in time of war), or to the fault of the guest. He thus practically guarantees the safety of the goods,—and especially against theft,—a liability which does not attach to bailees generally. This rule originated in early times when robbers infested the routes of travel, and was intended to protect the guest from collusion between the robbers and the innkeepers. Modern statutes have to a great extent relieved the innkeeper from this high degree of liability by providing that if he posts notices in the rooms to the effect that he has a safe in which valuables may be deposited, he shall not be liable for the valuables retained by the guest in his room or in his clothes. Whether "valuables" includes reasonable pocket money has been differently decided, but in a majority of the cases it is held that all money is included, and that if a guest retains any money he does so at his own risk.

The innkeeper is also bound to use due care to protect guests from assaults or insults, and especially those proceeding from the servants of the inn.

c. The innkeeper has a lien upon the baggage of his guest for the amount of the guest's bill. This enables him to retain the guest's baggage until his bill is paid. At common law the hotel keeper had no power to sell the goods in order to enforce the lien, but such power is now generally given by statute.

4. *Innkeeper as ordinary bailee.* An innkeeper is an ordinary bailee of goods brought to the inn by a guest for show or sale, of the goods of boarders, and of goods held by him under a lien. He may be a bailee without compensation in the case of goods left by one not a guest, or left for an unreasonable time by one who has ceased to be a guest. Where the innkeeper is an ordinary bailee

he does not guarantee the safety of the goods, but is merely liable for failure to use ordinary care.

81. Common carriers of goods. No other bailee for mutual benefit undertakes so high a degree of liability as a common carrier of goods, although by special contract the carrier now usually avoids the extreme liability fixed by the common law.

1. *Who are common carriers.* A common carrier is one who, in the exercise of a public calling, offers to carry for pay the goods of any person who may apply. A private carrier is one who so carries goods under special contract, without being engaged in the business as a public employment. A common carrier holds himself out as ready to serve all persons to the extent of his ability. In this respect he is like the innkeeper. Railways, steamboats, canal boats, express companies, stages, truck and bus lines, and the like, so far as they carry goods, are common carriers.

2. *Liabilities.* Two things distinguish the liabilities of common carriers from those of private carriers and most other bailees: first, common carriers are liable for wrongfully refusing to receive and carry goods; second, they guarantee the goods against all loss or damage, except such as may be caused by the act of God, or of the public enemy, or of public authority, or of the shipper himself, or which may be due to some defect or quality in the goods themselves, like the capacity of dynamite to explode.

First. The duty to carry for all arises from the public nature of the calling. A refusal to carry up to the limit of his facilities may render a common carrier liable in damages, or he may be compelled by the courts to perform the duty. Dangerous goods, or goods other than those which the carrier professes to carry, may be lawfully refused. Carriers may now very generally be required by the Interstate Commerce Commission or the Public Service Commissions to supply reasonably sufficient cars and other facilities and to carry the goods which the community requires to have carried. The duty to carry for all implies the duty not to discriminate between customers by giving any preference to the goods of one over those of another, or by charging one shipper more than a reasonable rate while carrying for another at a reasonable rate. There exist in most states statutes giving Public Service Commis-

sions power to fix the rates to be charged by common carriers for transportation beginning and ending within a state, and the Federal Congress has enacted a similar statute, known as the Interstate Commerce Act, providing power in the Interstate Commerce Commission to regulate the rates to be charged for transportation from one state to another.

Second. The liability for loss or damage is very great. In the absence of contract to the contrary, or of statutory modification, a common carrier is liable absolutely for all loss or damage to the goods in his hands as common carrier, except as follows:

a. The carrier is not liable for loss occasioned by an act of God, that is, by some force of nature beyond the control of man and unconnected with any human agency. Lightning, extraordinary floods, cyclones, and the like are regarded as acts of God. Fire, unless occasioned by lightning, is not. Even if the loss is due to an act of God, the carrier may be liable if the negligence of the carrier made it possible for the goods to be destroyed by the act of God.

Examples. 1. The carrier negligently delays goods at Albany, where there is known to be danger of a flood. Even if the goods are destroyed by an extraordinary flood, the negligence in delaying them there may render the carrier liable.

2. A steam boiler explodes without any known cause and injures a shipper's goods. The carrier is liable.

3. Lightning sets fire to a freight car and destroys its contents. The carrier is not liable.

4. A fire breaks out from causes unknown and destroys freight. The carrier is liable.

b. The carrier is not liable for loss or damage occasioned by the public enemy, that is, by an organized military force making war upon the country of the carrier or by pirates on the high seas. Mobs, rioters, strikers, and the like are not regarded as public enemies within this exception. The carrier is liable for loss by theft. If he negligently exposes the goods to the risk of destruction by the public enemy, when he could take a safer route, he will be liable for the loss.

c. The carrier is not liable for losses due to the fault of the shipper.

Examples. 5. The shipper improperly packs breakable goods, as china, and they are injured in transit. The carrier is not liable.

6. The shipper conceals money in a box of ordinary freight and it is lost. The carrier is not liable for the loss of the money, because he is entitled to be advised of the value of the goods in order that he may take necessary precautions.

d. The carrier is not liable for any loss or damage due to the intervention of some lawful public authority, as where goods are taken from him by health officers because the goods endanger the public health, or by seizure under legal process, as by a sheriff in order to collect a debt.

e. The carrier is not liable for loss or damage due to the dangerous qualities or defects in the goods.

Example 7. The carrier is not liable for the decay of fruit unless he has negligently delayed it in transit. He is not liable for the death of stock due to disease or fright unless such death can be traced to some carelessness of the carrier.

In any case the carrier is liable for his own negligence to the same extent as any bailee for hire. He is liable for departures from the required route of travel or delays resulting in loss if due to his carelessness.

3. *Changes of liability by contract or statute.* A common carrier may, unless forbidden by statute to do so, contract with the shipper to limit his liability to that of an ordinary bailee; that is, he may contract against guaranteeing the safety of the goods. The rule that he should guarantee the safety of the goods was intended to protect the shipper against collusion between the carrier and highwaymen or other robbers. The reason for the rule has almost entirely disappeared, and therefore the courts uphold contracts which do away with the rule so far as they are reasonable or not contrary to public policy.

Carriers have also sought to get shippers to release carriers from liability for their own negligence or that of their employees, that is, against the liability fixed for an ordinary bailee. This most

courts have refused to permit them to do, on the ground that such releases are contrary to public policy.

The Federal Interstate Commerce Act now allows carriers engaged in interstate commerce to establish rates which depend upon the value placed on the goods by the shipper. The higher the valuation the higher the rates. Such a valuation placed upon the goods is binding on the shipper, and if the goods are lost or destroyed, the shipper can recover no more than the value which he has placed on the goods. Such valuation contracts in intrastate shipments are also generally upheld.

Contracts also frequently require claims for loss or damage to be presented within a stated time; and if the time allowed is reasonable, these are also upheld.

A mere notice not brought to the attention of the shipper cannot operate to limit the carrier's liability. But a notice in a bill of lading, express receipt, and the like is presumed to be assented to by the shipper who receives it, if it is delivered to him before the goods are beyond recall. This rule does not apply to a local baggage carrier who gives a receipt for baggage, because custom has not made such receipts evidence of a contract. In the case of the ordinary railway ticket it must be shown that the person receiving the token or ticket actually saw or knew of the notice when he took the receipt or purchased the ticket, or had notice that there was *some* limitation in the ticket or accepted the ticket with notice that it was a special contract.

The Federal Interstate Commerce Act also provides regarding interstate shipments that if the goods shipped are not valued by the shipper in accordance with the provision described above, then, unless the goods consist of baggage on passenger trains or boats, the carrier cannot exempt itself from liability by any provision in the bill of lading or otherwise.

Needless to say the valuation clause which permits limitation of liability is very generally used by the railroads.

4. *When liability ends.* Liability as carrier ends when the goods are delivered to the consignee (that is, the person to whom the goods are shipped), or when after notice the consignee leaves the goods an unreasonable time in the hands of the carrier. In the

latter case the carrier ceases to be liable as carrier and becomes liable as warehouseman. In many states[1] a railway carrier becomes merely a warehouseman, without notice to the consignee, when the goods arrive at their destination and are unloaded into the railway freight house; in other states[2] the change of position occurs after the goods have been in the freight house a reasonable time; and in still other states[3] it is further required that notice of arrival shall have been given to the consignee or a reasonable effort made to give such notice.

Liability also ends when a carrier, having received goods to be transported over its own and connecting lines, has delivered the goods to a connecting carrier, unless the first carrier has contracted to transport the goods to their final destination.

But by the Interstate Commerce Act, where several carriers are engaged in transporting goods from one state to another or from the United States to a foreign country, the first carrier is liable for all loss or damage on through shipments, even though such loss or damage may have been caused by acts of the second or later carriers. The first carrier may, of course, recover from the carrier actually responsible for the loss or damage any sums which the first carrier has been obliged to pay under this statute.

5. *Delivery.* The carrier must deliver the goods to the consignee or a connecting carrier or pay damages for nondelivery, (1) unless they are claimed by one whose title is superior to that of the consignee, as by a true owner whose goods have been converted, or (2) unless the consignor has exercised the right of stoppage in transit (see page 101 *ante*), or (3) unless they have been lost from a cause for which the carrier is not liable. If the carrier delivers to the wrong person, he is liable for conversion or misappropriation. The carrier must use care to notify the consignee of the arrival of the goods.

6. *Bills of lading.* A bill of lading is the written receipt, by

[1] Georgia, Illinois, Indiana, Iowa, Massachusetts, Missouri, North Carolina, Pennsylvania, South Carolina.

[2] Alabama, Kansas, Kentucky, New Hampshire, Vermont, West Virginia, Wisconsin.

[3] Michigan, Minnesota, Mississippi, New York, Ohio.

a carrier, for goods delivered to the carrier for transportation, and an agreement to carry and deliver them to a person named in the bill of lading or to his order. It is signed by an agent of the owner of the vessel, railroad, or other carrier.

The rules regarding the issuance and transfer of bills of lading for intrastate shipments, and the rights and duties of carriers and shippers thereunder, are now set forth in twenty-six jurisdictions[1] in the Uniform Bills of Lading Act. By Act of August 29, 1916, Congress passed a Bills of Lading Act substantially identical with the Uniform Bills of Lading Act. The Federal statute, of course, governs only bills of lading used in interstate commerce and commerce between the United States and a foreign nation or the dependencies of the United States.

A charter party is a written contract for the carriage of freight, by which the owner of a vessel lets the whole or a part of her to a person for the transportation of goods for a particular voyage, in consideration of the payment of freight charges. A charter party may leave the possession and control of the vessel with the owner, or may transfer the possession and control to the shipper.

With the growth of commerce and the increase in the number of carriers it has been found advantageous to have a uniform bill of lading. The Interstate Commerce Commission has approved a standard straight bill of lading and a standard order bill of lading which are now in general use for interstate shipments. A straight bill of lading provides that the goods are to be delivered to the consignee only, whereas an order bill of lading requires delivery to the consignee or his order. Both by the Federal and state Bills of Lading Acts order bills are negotiable, that is, a bona fide purchaser of an order bill gets good title even from a thief or finder of the bill. Shippers, when once familiar with them, need not scrutinize each bill of lading in order to ascertain whether it contains some new term.

[1] These jurisdictions are Arizona, California, Connecticut, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, Alaska, and the Philippine Islands.

Uniform Domestic Order Bill of Lading Adopted by Carriers in Official, Southern and Western Classification Territories, March 15, 1922.

UNIFORM ORDER BILL OF LADING

(PRESCRIBED BY THE INTERSTATE COMMERCE COMMISSION)

Shipper's No. 12360

ORIGINAL

Agent's No. 422

LEHIGH VALLEY RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

at Wilkes-Barre, Pa. Oct. 24, 1916.

from De Witt C. Ott

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

The surrender of this Original ORDER Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

(Mail or street address of consignee — For purposes of notification only.)

(312 So. Water St.)

Consigned to ORDER OF Johnson Bratt Lum Co.

Destination Omaha State of Nebraska County of Douglas

Road

At State of County of

Route Mich. Cent. G.T.&W. Car Initial Car No.

(Connecting carrier)

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
2	boxes books	400		

If the shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. *(See section 7 of conditions.)*

(Signature of consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE. Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

$100 per 100 lbs.

De Witt C. Ott Shipper Anson Brown Agent

Per Per H.C.

Permanent post-office address of shipper 314 Sexton St. Wilkes-Barre

BILL OF LADING

A shipping order is also used as a part of the uniform bill-of-lading forms. This is an order signed by the shipper and addressed to the carrier, directing him to receive and carry the goods. It contains the same conditions as the bill of lading.

There are also in use a uniform export bill of lading and a uniform live-stock bill of lading.

Example 8. Barton shipped a carload of apples from Rochester, New York, to New York City, over the Lehigh Valley Railroad. On delivery of the apples into the car he received a bill of lading from the railroad which stated that the car would be delivered at New York City to Barton "or order." In order to collect the price of the apples from the dealer in New York to whom he was selling them, Barton indorsed the bill of lading to a bank in Rochester and turned it over to the bank with a draft drawn on Mercolino, the buyer of the apples in New York, in favor of the Rochester bank. The bank then gave Barton credit for the amount of the draft, less costs of collection, and sent the draft and bill of lading to its New York correspondent bank, which presented it to Mercolino, who paid it by a check, and received from the New York bank the bill of lading indorsed by Barton and by the Rochester bank. Mercolino presented the bill of lading to the railroad in New York and got the apples. The bill of lading was negotiated twice in this illustration.

IV. Cases not Strictly of Bailment

82. Public carriers of passengers and baggage. Public carriers of passengers are those who in the exercise of a public calling hold themselves out as ready to carry all passengers who apply. They are not, of course, bailees of the persons whom they carry, although they are bailees of a passenger's baggage delivered into their custody. Proprietors of railways, interurban lines, street railways, bus lines, stagecoaches, steamers, ferries, omnibuses, and the like are public carriers.

1. *Passengers.* Passengers are those persons carried by a public carrier with his consent, except persons in his service. Persons carried free of charge, as well as persons who pay their fare, are included. It is the duty of a public carrier, up to the limit of reasonable accommodations, to carry all who are orderly and who pay the reasonable charge.

2. *Liability of public carrier of passengers.* A public carrier does

not insure the safety of passengers as he does the safety of goods, but he is bound to use the utmost skill, diligence, and caution, so far as human foresight may go, and is liable for slight negligence in this regard. He is liable also for any willful injury inflicted by one of his servants, and is bound to use reasonable care to protect the passenger from violence at the hands of other passengers. He may put a passenger off for refusal to pay fare or for disorderly conduct, using only as much force as is necessary for that purpose.

Whether a carrier may limit its liability to a passenger by contract, and especially the liability for the negligence of servants, is a disputed question. The courts of most states regard such contracts as against public policy and void where the passenger has paid a fare, although many courts permit a carrier to limit its liability to a passenger carried free of charge.

3. *Baggage.* A carrier is bound to transport a reasonable amount of baggage for each passenger. Baggage includes such articles of necessity or convenience as a passenger may carry for his personal use, but not articles carried as merchandise. For all baggage that is delivered into the custody of the carrier he is absolutely liable, unless the liability is limited by lawful contract. In this respect the liability is the same as that of the carrier of goods. There are, therefore, usually but three questions that arise in the case of the loss of baggage: (1) Were the articles lost really the baggage of the passenger? (2) Was the baggage actually delivered into the custody of the carrier or did the passenger retain custody of it? (3) Was there any lawful contract limiting the liability of the carrier?

Examples. 1. A traveler going to the woods for recreation carried in his trunk guns and fishing-tackle and tennis rackets. The trunk was lost by the carrier. These articles were held to be properly baggage.

2. A commercial traveler carried in a trunk samples of the goods he was selling. These were held not to be baggage.

3. A traveler carried in his trunk presents for friends. These were held not to be baggage.

4. A traveler carried a hand bag into the car and left it in his seat while he went to the smoking-car, and it was stolen. The baggage was not in the custody of the carrier, and the latter was not liable for the loss.

83. Federal control and regulation of railroads. Since the establishment of the Interstate Commerce Commission in 1887 the Federal government has exercised more or less control over interstate railroads. The latest act on this subject is the Transportation Act of 1920, also known as the Esch-Cummins Act. Under this and previous legislation the Interstate Commerce Commission is vested with large powers over the railroads. It establishes the rates they may charge and controls the issuance of stocks and bonds by them. The commission has been since 1914 engaged in a valuation of the property of the railroads, in order to enable the commission to judge what is a fair return to the railroads by way of income on that property. The government now guarantees to the railroads a certain income. All income received above a certain percentage (about 6 per cent) is to be divided into two equal parts, and one half held by the railroads as a reserve fund and the other half paid over to the government in order that it may use it to make loans to the weaker railroads whose earnings are deficient. The Federal Labor Board is charged with investigating disputes between railroads and their employees over wages and conditions of work, and settling those differences.

84. Telegraph companies. These companies render a public service and are bound to serve all persons alike and for uniform reasonable compensation. In so far as they do an interstate business they are under the control of the Interstate Commerce Commission. They do not insure the safety and accuracy of messages, but are bound to use reasonable care and are liable for ordinary negligence.

Whether they may by contract provide that they will not be liable for their own negligence is a disputed question. The majority of state courts regard such contracts as against public policy and void. Where such contracts are upheld, the telegraph companies refuse to become liable for errors in sending messages unless the sender has the message repeated and pays an added compensation therefor. Since 1910 the Federal Interstate Commerce Commission has had control of companies doing an interstate business, and the Federal courts have sustained contracts limiting the sender's recovery to the amount paid for sending the message.

Either the sender or the person addressed in the telegraph message may sue in tort for damages arising from the negligence of the company, but only the sender can sue for breach of contract, because he alone has made a contract—unless, indeed, the sender was actually the agent of the addressee and made the contract in his behalf.

It is generally made a criminal offense for telegraph companies or any of their employees to reveal the contents of telegrams to anyone except the addressee.

85. State regulation of public-utility corporations. In nearly every state there is now a commission called a public-service commission, or public-utility commission, which has the power to regulate the business of street-railway companies, gas, electric, telephone, and power companies, and other similar corporations, which furnish the public with services which are highly important to comfort and to business. These commissions regulate the rates to be charged for the service, the issuance of stock and bonds by the corporations, extensions of the service, and similar matters. Detailed annual reports are required from the corporations to the commission. The object is to protect the public against too high rates, to insure good service, and to give to the stockholders of the corporation a fair return on their investment.

Example. The company furnishing gas to the inhabitants of Joliet, Illinois, wishes to increase its charge, owing to the increased cost of coal. It cannot do this without applying to the Illinois Commerce Commission and proving that the company cannot earn a fair return on its gas business without such an increase in rates. The public in Joliet may be represented at this hearing by the city attorney or a representative of the state attorney-general.

REVIEW QUESTIONS AND PROBLEMS

73. Define bailment; bailor; bailee. Is a finder of lost property a bailee? How is his duty fixed? What is the consideration for a bailee's promise? Can one who does not own property bail it to another? Distinguish bailment from sale; from barter. May a bailee mix the goods with other like goods?

74. State the two classes of bailments. State the subclasses of each. What is a pawn? What is a hiring? State two cases not strictly bailment but treated thereunder.

75. How is a bailment for bailor's sole benefit created? Is it a contract? Must the bailor know of it? Must the bailee consent to it? What are the bailor's duties? What are the bailee's duties? How much care must he use? Can he use the article? Is he liable if the article is lost? When is this bailment ended?

Problem 1. A bank undertook without charge to keep in its vaults a locked chest of McAdoo's containing $50,000 in gold. The bank cashier stole it, together with money belonging to the bank, and absconded. Is the bank liable to McAdoo?

Problem 2. In the above case the directors learned that the cashier was engaged in heavy stock speculations, but took no steps to investigate his conduct. Result?

76. How is a bailment for the bailee's sole benefit created? Is a promise to lend enforceable, and why? What is the bailor's duty? What are the duties of the bailee? How much care must he use? May he lend the article to others? May he use it for a purpose not agreed upon? May the bailee deliver the article to a claimant other than the bailor? How is this bailment ended?

77. Define a pledge. How is it created? What is essential? What warranty does the pledgor make? Can he sell the pledged article? Can the pledge be made incapable of being redeemed? What are the duties of the pledgee? What care must he use? What are the pledgee's rights? How may he sell the pledged goods? Can he purchase? When is the pledge ended? What claim does the pledge secure? Who are pawnbrokers? May they charge more than the usual rate of interest?

Problem 3. Conley owed a bank $5000. He then borrowed of the bank $10,000 and pledged 300 shares of stock as security for the loan. Conley then became insolvent and all his property was transferred to a trustee for the benefit of his creditors. The bank sold the stock for $13,500, paid the loan of $10,000, and applied the surplus of $3500 on the prior indebtedness. The trustee sues the bank for the $3500. Who is entitled to it?

78. How is a bailment by hiring a thing created? Is a promise by the bailor to hire it to the bailee enforceable? What does the bailor warrant? What is his duty as to defects in the goods? What are the rights of the bailee? What are his duties? How much care must he use? If a third person injures the article, is the bailee liable? Is the bailee liable to third persons, and when? Are they liable to him? Are they liable to the bailor? Who is liable in case the article is accidentally destroyed? If the bailee uses the article otherwise than he agreed, what is the result?

Problem 4. Childs hires a horse and carriage of Bridgman. Young negligently runs into and injures the carriage to the extent of $20. Childs sues Young for this damage. May he recover?

Problem 5. As above. The horse falls sick while Childs is on a journey. Childs leaves him with Moore for care and treatment. Moore sues Bridgman for the expense. Result?

79. What are the classes of bailments involving the hiring of services about a thing? What are the duties of the bailor? How is compensation fixed? May the bailee recover if he abandons the work when it is only partly done? May he recover if, after he has finished the work, the article is destroyed? What are the duties of the bailee? How much care must he exercise? What is the bailee's lien? Who is a warehouseman? May he mix goods? Who are wharfingers? Is a safe-deposit box a warehouse? Does money deposited in a bank create a bailment?

Problem 6. Cohen deposited his goods in Cook's warehouse. They were stolen. Cohen sues Cook. Cohen contends it is for Cook to show that he used due care. Cook contends it is for Cohen to show that Cook was careless. Which is right?

80. Who are innkeepers? Is a steamship an inn? Is a sleeping-car? Who are guests? Must an innkeeper receive all guests who apply? What are his liabilities as to a guest's goods? What do statutes provide? What is the innkeeper's lien? When is an innkeeper an ordinary bailee?

Problem 7. Collens drove to an inn and had his horse placed in the stable connected with it. The horse was kicked by the horse of another traveler and its leg broken. Collens sues the landlord of the inn. The landlord offers to prove he was not careless. Would such proof release him from liability?

Problem 8. An inn is accidentally burned and a guest's clothes, jewelry, etc. are destroyed. Is the innkeeper liable?

Problem 9. While Crowley was in a sleeping-car berth, and while asleep, he was robbed of his money and watch. Is the sleeping-car company liable to him for this loss?

81. Who are common carriers? What two things distinguish a common carrier from a private carrier? What goods must a common carrier accept? May he give special rates? What statutes govern rates? How can a common carrier escape liability for loss of goods? What is an act of God? Who is a public enemy? When is the shipper at fault? What are dangerous qualities in the goods? May a carrier contract against loss by above causes? May he contract against loss due to his own negligence or that of his servants? When does his liability as common carrier end? What is the liability of a railway when goods reach their destination and are placed in the freight house? When goods go over several railways, which is liable for damage to them? When is a common carrier excused for nondelivery? What is a bill of lading? What are the Bills of Lading Acts? Is a bill of lading negotiable? What is a charter party?

Problem 10. Slade owned a sloop which he used for his own business. On two occasions he carried goods for Clegg. On the second occasion the sloop was driven ashore (not by an act of God or by the negligence of Slade) and the goods were injured. Is Slade liable to Clegg?

Problem 11. Forsaith owns a vessel running regularly between two ports and carrying passengers and freight. Coleman ships goods on the vessel. It is destroyed by fire while at sea. Is Forsaith liable to Coleman for the loss of the goods?

Problem 12. In the above case the vessel is captured by a war vessel of another nation with which Forsaith's nation is at war, and the goods are confiscated. Is Forsaith liable to Coleman?

Problem 13. Coe shipped plate glass from Cincinnati, Ohio, to Raleigh, North Carolina. The glass went over four different railroads. At Raleigh it was found to be broken. Coe sues the Seaboard Air Line, which delivered the glass at Raleigh. The bill of lading provided that "no carrier shall be liable for loss or damage not occurring on its own road," and only for loss by negligence. When the Seaboard Air Line received the box, there was no sign of breakage, nor was there any when it reached Raleigh, until the box was opened. The Seaboard Air Line contends that it is not liable unless Coe shows that the breakage occurred on its road. Coe contends that the Seaboard Air Line must show that it was not negligent. Which is right?

82. Who are public carriers? Who are passengers? What is the liability of a public carrier for the safety of passengers, and what for the safety of baggage? What is baggage? May the carrier limit liability for its loss?

Problem 14. Dee, a passenger, brought action against the Chesapeake and Ohio Railway for loss of baggage. Her trunk contained very valuable dress laces worth $10,000. Dee was a wealthy foreigner traveling in this country, and the laces were a part of her wearing apparel. Under what circumstances is the railway liable for these laces?

83. What is the general purpose of the Transportation Act of 1920? What is the Federal Labor Board?

84. What is the liability of telegraph companies? May they contract against their negligence? May the addressee of a message sue for negligence?

85. Describe the general effect of statutes creating state public-service commissions to regulate public-service companies.

CHAPTER VI

INSURANCE CONTRACTS

86. Nature and kinds of insurance. Insurance is a system for distributing the losses of a few persons among a large class of persons similarly situated. This is accomplished by raising a general fund through small contributions by many persons, each contributor being entitled to be paid out of the fund in case a loss falls upon him. If 1000 persons, having, in the total, property valued at $5,000,000, pay annually into a common fund 1 per cent upon this valuation, a fund of $50,000 will be raised, out of which losses by fire falling upon any of these persons could be paid. If these 1000 persons live in widely separated parts of the country, it is unlikely that many of them will suffer losses by fire in the same year.

Almost every possible risk may now be insured. The principal kinds of insurance are marine insurance, fire insurance, and life insurance, but there are companies which insure against tornadoes, steam-boiler explosions, breakage of plate glass, defects in land titles, defaults or embezzlements by employees, burglary, rain, injuries to employees, injuries to one's self, ill health, and numerous other hazards.

Marine insurance, that is, insurance against the risk of the loss of vessels and cargoes at sea, is probably the oldest form of insurance and has been traced back to the twelfth or thirteenth century. Fire insurance came into prominence after the great London fire of 1666. Life insurance began somewhere about the eighteenth century.

In marine and fire insurance the properties insured are classified according to the risk, and the premium is higher or lower as the risk is greater or less. In life insurance only those persons who are regarded as good risks are insured, and the premiums are graded

according to the age of the insured. Statistics as to the length of life and expectation of life at any given age have been accumulated, upon which average results may be predicted and the premiums based.

87. Kinds of policies. The policies, or contracts of insurance, issued by insurance companies are of various kinds, but it is necessary to distinguish the valued and the open policy.

The valued policy is one that fixes the amount to be paid in case of loss. These policies are always used in life insurance, and are very generally used in the insurance of ships, though not of cargoes. In case of the death of the insured or the loss of the ship the sum specified is paid.

The open policy is one in which the amount to be paid in case of loss, not exceeding a certain sum, is left to be fixed after the loss occurs. These policies are generally used in fire insurance.

Life-insurance policies may be either the life policy, payable only at the death of the insured, or the endowment policy, payable when the insured reaches a certain age or upon his death at any prior date. There is also a term policy for a fixed number of years, payable only if the insured dies within that time. In the limited-payment policy the premiums are paid during a term of years only and not during the whole life of the insured, while the policy is payable at the death of the insured only.

88. Definitions. Insurance is a contract whereby for a fixed payment one party agrees to pay the other for loss on a specified subject by certain described dangers.

The insurer is the one agreeing to pay for the loss; he is sometimes called the underwriter. The insured is the one who is to be protected against loss. The premium is the sum paid by the insured for the insurance. The policy is the written contract. The risk, or peril, is the event insured against. The insurable interest is the subject, right, or interest to be protected; it is such an interest as will entitle the person possessing it to obtain a lawful contract of insurance (see section 90 *post*).

"*Life insurance*" is a contract to pay a certain person, or someone to be later named, a sum of money, or a certain amount each year, in the event of the death of the person whose life is insured.

Endowment life insurance is a contract to pay a certain sum or annuity to the person whose life is insured if he lives a certain length of time, or to another person if the insured dies before this time. An endowment policy is a form of investment by the insured as well as an insurance proper.

"*Accident insurance*" is a contract to protect the insured from loss arising from personal injury resulting from accident, and usually includes a contract to pay a fixed sum to his estate or to a named person in case of death resulting from accident.

"*Workmen's compensation insurance*" is a contract to protect an employer against loss suffered from having to pay to an employee a sum due because of injuries sustained by the employee in the course of his employment.

"*Marine insurance*" is a contract to protect the insured against loss to property (ships and cargo) arising from the perils of the sea during a certain voyage or a certain period of time. It may be issued to cover risks arising on any navigable waters, whether sea or inland.

"*Fire insurance*" is a contract to protect the insured against loss of property or damages to it by fire.

"*Casualty insurance*" is a contract to protect the insured against damage to property arising from accidents, such as boiler explosions, floods, tornadoes, hail, failure of crops, breakage of plate glass, death of cattle, burglary, etc.

"*Guaranty and fidelity insurance*" is a contract to protect the insured against loss arising from fraud or dishonesty of agents (fidelity insurance); the insolvency or dishonesty of debtors (credit insurance); the failure of tenants to pay rent or the loss of rents caused by fires or other injury to premises (rent insurance).

"*Indemnity and liability insurance*" is a contract to protect the insured against actual loss or liability arising from the carelessness of one's employees which results in injury to fellow employees or to others (employers' liability insurance); the injury to passengers for which the carrier is obliged to pay damages (carriers' insurance); the defect or failure of the title to real property (title insurance); the interruption of business by strikes among employees (strike insurance); injuries to other persons or their prop-

erty resulting from the operation of one's automobile (automobile liability insurance). The insurance is indemnity insurance if it renders the insurance company liable only when the insured actually has paid a loss; it is liability insurance when the company is liable on the policy merely by proof of a liability incurred on the part of the insured, even though the insured has not actually paid any loss.

Reinsurance is a contract whereby the reinsurer agrees to assume the risk, in whole or in part, which was undertaken by the original insurer. If the reinsurance policy binds the reinsurer to pay the insured, the latter may maintain an action against the reinsurer upon the theory of a promise made to one person for the benefit of another person (see section 34 *ante*); but in the absence of such a clause the insured can look to the original insurer alone, and the original insurer will look to the reinsurer for reimbursement. It often happens that an insurer takes a very large risk and thinks it prudent to divide it by reinsuring some portion of it in another company. The reinsurance is a kind of guaranty insurance.

89. Characteristics of the insurance contract. There are these main features in the insurance contract.

1. The contract is a gamble; that is, it depends upon an uncertain event. It is a wagering contract. If one insures property or a life in which he has no insurable interest, the contract is called a wager and is illegal. If he has an insurable interest, the contract is valid, although it is still in the nature of a gamble.

2. The contract is one of indemnity; its object is to make good against loss in the event that loss occurs. In the open policy the amount of the loss is to be discovered after it occurs. In the valued policy the parties agree in advance upon the value of the subject matter of the contract; if it is then destroyed, the loss is taken to be that so fixed by the parties. In life-insurance policies the sum is always fixed, subject to a possible increase by way of dividends.

There is one important difference between an open fire policy and an open marine policy. If, in an open fire policy for $10,000 on property worth $20,000, property worth $5000 is destroyed, the insured recovers its full

value. In an open marine policy he would recover only that proportion of the amount insured ($10,000) which the loss ($5000) bears to the true value of the property insured ($20,000), namely, one fourth, or $2500. In order to be fully protected in a marine risk the insured must insure to the full value and, of course, pay a larger premium.

Another incident of the indemnity feature is that if the property insured is destroyed by the careless act of a person other than the insured or insurer, so that the owner might maintain an action against the wrongdoer for the damage, the insurer, upon paying the loss to the insured, is subrogated (that is, substituted) to the rights of the insured in such action. If it were otherwise, the insured would recover his loss twice over. This does not apply, however, to life insurance where the insured is killed by the wrongful or negligent act of another.

If the insured has two fire policies in different companies on the same property, the companies contribute proportionately to indemnify for any loss. If one pays the whole loss, it may secure a proportionate contribution from the other.

3. The contract indemnifies even against the carelessness or negligence of the insured. This is highly important, because if the insurer could defend after loss upon the ground that the insured, by his negligence, contributed to the loss, the policy would not be nearly so valuable a security against serious losses. It does not protect against willful destruction by the insured, except that suicide will not, by the weight of authority, defeat a life-insurance policy unless the insured can be shown to have taken out the policy with the intent to commit suicide. There are also many terms and some warranties in insurance contracts, the breach of which may prevent the insured from recovering; for example, in accident policies the provision that the insured shall not voluntarily expose himself to unnecessary risks, or in fire policies the clause that the insured shall use reasonable care and means to save property after a fire begins.

The effect of suicide on the right to recover on a life-insurance policy has caused the courts much perplexity. Most courts refuse to allow the estate of the deceased to recover where the insured committed suicide when sane, regarding it as against public policy. Some states allow a third person named as beneficiary to recover where they do not allow the estate of the deceased to recover. If the insured took out the policy with the intention of committing suicide, and did so, it would be a fraud on the company to allow a recovery. All courts allow a recovery in any case where the in-

sured committed suicide while insane, unless the policy expressly excepts that risk; but the exception of the risk of "death by suicide" covers only suicide while sane; in order to exempt the insurer the policy should read "death by suicide whether sane or insane excepted." One or two states have by statute forbidden insurance companies to insert such a clause.

In case the insured is executed by the law for a capital offense, the insurer will not be liable on the policy, even though that risk is not expressly excepted.

Many life-insurance policies now contain a clause declaring that the policy cannot be contested after a certain period (say two or three years after it is issued). In such case it is generally held that the insurer can contest the policy only for a lack of any insurable interest or for actual fraud in procuring it.

4. The insured must have an insurable interest (see section 90).

5. The contract requires the highest good faith on the part of the insured (see section 91 *post*).

6. The contract contains warranties, the breach of which may avoid the policy (see section 92).

7. The statutes often prescribe the form of policy which must be issued (see section 93). Insurance contracts may be oral. Statutes prescribing a form of policy do not prevent oral contracts, but subject an oral contract to the provisions of the statutory policy. It is usual in large insurance offices to issue to the insured temporarily a "binding slip," which is a brief note of the insurance contract and gives protection until the delivery of the formal insurance policy.

90. The insured must have an insurable interest. In order that a policy may be valid it is necessary that the one taking it out shall have an insurable interest in the property or the life upon which the policy is issued.

1. *Insurable interest in property.* An insurable interest in property is an interest in property, or a liability in respect of property, of such a nature that the loss of the property might cause a financial injury to the one possessing such interest or under such liability.

Examples. A pledgee has such an interest in the pledge that its destruction would or might result in a financial loss to him; so also, of course, has the pledgor. Both the mortgagor and the mortgagee of property have an

insurable interest. A stockholder has an insurable interest in the property of the corporation. A farmer has an insurable interest in crops to be raised in the future upon his land. A mere chance or expectancy, like that of an heir who expects to inherit his ancestor's property, does not create an insurable interest. If one insures his property and afterward sells it, the policy does not pass to the new owner without an assignment with the consent of the insurer.

2. *Insurable interest in a life.* This is very difficult to define. Any reasonable expectation of financial benefit from the continued life of another creates an insurable interest in that life. If one depends upon another for support or education, in whole or in part, he has an insurable interest in that other's life. Thus, a wife has an insurable interest in the life of her husband. If one is entitled to the services of another, he has an insurable interest in that other's life. Thus, a husband has an insurable interest in the life of his wife, and a father has an insurable interest in the life of his children under twenty-one. If one has a claim for money against another, he may insure that other's life. Thus, a creditor has an insurable interest in the life of his debtor. Mere relationship by blood or marriage does not of itself create an insurable interest. One brother has no insurable interest in the life of another brother merely because of the relationship; he might have if he were dependent upon the brother. One may value his interest in his own life, or in the life of one upon whom he depends, or to whose services by virtue of family relationship he is entitled, at any sum agreed upon; but a creditor cannot insure the life of his debtor for a sum greatly in excess of the debt. It is necessary that the person whose life is insured by another (unless he is an infant) should consent to the insurance.

The insurable interest in property must continue throughout the term of the policy, or at least exist at the time of the loss. It is enough in life insurance that the insurable interest exist at the time the policy is taken out. So also in life insurance the policy may be assigned to one who has no insurable interest, if it was taken out in good faith by one who had an insurable interest; and the insured may make his policy payable to anyone if he takes it out himself. Where a policy fixes the beneficiary and does not

reserve the right in the insured to change the beneficiary, the right under the policy becomes vested in such beneficiary and cannot be taken away from him without his consent, except in mutual-benefit insurance,—such, for example, as that provided by fraternal orders. Should the beneficiary die, however, before the insured, a new beneficiary may be named.

91. The contract of insurance is one requiring the highest good faith. In ordinary contracts a party is not bound to disclose what he knows about the subject of the contract; it is for the other party to discover whatever he may consider important. So long as there is no untruthful statement the contract is valid and binding, notwithstanding the fact that one party knew and did not tell certain material facts; but insurance contracts stand upon a peculiar basis in this respect.

1. *Concealment.* The insured is bound to disclose to the insurer every material fact known to him which affects the risk. But this rule is qualified in the United States, except as to marine insurance, by requiring that bad faith be shown in order to avoid a policy because of concealment.

Examples. 1. An attempt has been made to burn property belonging to Kerr. Kerr becomes alarmed and takes out insurance without disclosing this fact. The policy may be avoided by the insurer upon the ground of Kerr's concealment.

2. Hines takes out insurance upon his house, omitting to state that it is within a few feet of a fireworks manufactory. This concealment makes it possible for the company to cancel the policy.

The rule is very strict in marine insurance and extends to innocent failure to disclose a fact, due to forgetfulness or carelessness; but in fire and life insurance it now probably extends in this country only to intentional concealment of some material fact, amounting to bad faith. Where the insurer asks a series of questions in an application blank, a truthful answer to these questions is all that is generally required; but even in this case the insured cannot intentionally conceal a highly material fact, as that an attempt has been made to set fire to the property.

2. *Representations.* Representations are statements as to im-

portant existing facts, made by the insured, usually to give information concerning the risk, and inducing the insurer to issue a policy, but which do not become terms in the contract itself. A material false representation, however innocently made, will avoid the policy; there is an implied condition that a policy shall be enforceable only if the representations which led the insurer to issue it are true. But a representation as to future conduct, that is, as to what the insured will do, is not technically a representation, because not made as to an existing fact. It is of no effect unless it is made a term in the policy. So representations as to opinion or belief are not material; no one should rely upon them.

Examples. 3. Hurd insures Doty's warehouse. Doty by mistake states that there is already $200,000 of insurance on the building; there was in fact but $30,000. This is material, since with $200,000 of insurance Hurd's liability in case of loss would be less than if there were but $30,000. If the building burns, Doty can recover nothing from Hurd. It makes no difference that Hurd believed his statement to be true.

4. Tutchings orally states to Perry that if Perry insures his building he (Tutchings) will cease to use a certain fireplace in it. The building burns. Perry seeks to avoid the policy by showing that Tutchings continued to use the fireplace. This is a promissory statement and it will not avoid the policy. If Perry wants the benefit of a promise, he must put it into the written contract.

92. Warranties. Unless there be a waiver of it, or an estoppel to set it up, the breach of a warranty in an insurance contract will avoid the policy.

1. *Warranties explained.* A warranty is a statement or promise which is included in the policy itself, or in a separate paper read into the policy by reference, and which is made an essential part of the contract. Its falsity or nonfulfillment will avoid the policy. A representation is merely an inducement to the making of the contract. A warranty is a part of the contract itself. Representations must be shown to be material, and it is enough that they are substantially complied with. Warranties are material because inserted in the contract, and they must be strictly and literally complied with. They may either guarantee an existing fact or be in the form of a promise as to the future. Note that "warranty" has

one meaning in insurance contracts and another in contracts of sale (see sections 65–69 *ante*). In sales the buyer may, under the Uniform Sales Act and generally prevailing rule, treat the warranty as collateral or as vital, while in insurance contracts it is always a vital term in the main contract. If a warranty in a sale is broken, the buyer may elect between an action for damages and cancellation of the contract; but if a warranty in insurance is broken, it discharges the contract; no action for damages for its breach results.

Examples. 1. Fisher represents that his vessel has twelve guns and twenty men. She has substantially this number and the policy is good.

2. Fisher warrants that his vessel has twelve guns and twenty men. She has substantially this number, but the policy is avoided because there is a breach of the warranty in not having precisely the guns and force warranted.

3. Donovan represents that ashes are taken out of his factory in iron hods. They are taken out in copper hods. The representation is substantially true and the policy is binding. But if Donovan warrants that the ashes are taken out in iron hods, there is a breach of the warranty and the policy is avoided. (So strict is this rule that the courts incline to hold statements to be representations when possible.)

4. Blood, in answer to the printed questions in the application blank which are made by reference a part of the policy, states that he is thirty years old. He is in fact thirty-five. The policy is not binding on the insurance company. This is a warranty.

5. Turner states as a warranty that the building insured is used "for winding and coloring yarn." He afterward uses the building for another purpose. There is no breach of warranty. He did not warrant that the building would continue to be used for the purpose it was used for when the policy was taken out.

These rules as to warranties are so strict and work so many hardships that statutes in many states provide in substance that warranties shall not avoid an insurance policy unless they are in fact material. This makes warranties more like representations.

In general, courts will, if possible, construe an insurance policy so as to save the insured from a forfeiture for a merely technical breach that does not in fact injure the insurer.

2. *Waiver and estoppel.* The doctrines of waiver and estoppel are frequently invoked to prevent the insurer from taking advan-

tage of a misrepresentation or breach of warranty by the insured. Waiver is the voluntary giving up of a known right. Estoppel is a bar raised by the law to prevent one party from denying that he has given up a right when by his conduct, though unintentionally, he has led the other party reasonably to rely upon the conclusion that he has given it up.

Examples. 6. A policy provides that it shall be forfeited if the insured increases the risk. The insured increases the risk by using the property for manufacturing purposes. The insurer, with knowledge of the facts, tells the insured that the forfeiture is waived; this is binding. Again, with knowledge of the facts the insurer accepts the premium; this estops the insurer from denying that he has waived the forfeiture.

7. The policy provides that if the building insured is on leased ground, the policy shall be forfeited. Although this is a warranty that the building is not on leased ground, still if the insured informed the insurer, when the application was made, that the building was on leased ground, the insurer is held by a majority of courts to be estopped to set up a forfeiture.

Whether a particular agent has authority to waive a stipulation in the policy is often a question of great difficulty. Whether a restriction upon an agent's authority contained in the policy itself will operate as notice to the insured of such restricted authority is a question upon which the decisions differ. The weight of authority is that the agent who issues the policy may make a contemporaneous waiver, although he might not have authority to make a subsequent one.

93. Statutory or standard policies. In order to avoid the difficult questions and the uncertainties raised by the widely differing forms of fire-insurance policies, many states have passed statutes requiring the insurance companies to issue a uniform standard policy prescribed by the statute itself. Copies of these standard policies may be obtained of any fire-insurance agent, and they should be carefully read by all who carry fire insurance, in order that there may be no accidental violation of the terms by the insured.

94. Marine insurance. In the insurance of a ship or cargo against risks at sea there are always three implied warranties: namely, that the ship is seaworthy (that is, fit to go to sea), that there shall

be no voluntary departure from a specified route, and that the voyage shall be for a legal purpose.

General average is a contribution made by the various owners of a ship and cargo toward a loss sustained by one owner whose property has been voluntarily sacrificed for the common safety, as where, in a storm, goods are cast overboard to lighten the ship; but the one whose goods are thrown over loses his proportionate share of the goods also. Throwing property over for such a purpose is called jettison. General average is a rule of the admiralty courts based upon the customs of maritime commerce.

Example. Warner's property, valued at $4800, is cast overboard in order to save the ship and the rest of the cargo. The ship is valued at $50,000; it earns $2000 on the goods saved and loses $200 on the goods jettisoned; the rest of the cargo is Whitman's and is valued at $43,000.

Loss: $4800 + $200 = $5000.

Contributors: $4800 + $200 + $52,000 + $43,000 = $100,000.

Percentage loss for each, 5 per cent.

Warner gets $4800 − $240 = $4560, of which the ship pays $2600 − $190 = $2410, and Whitman pays $2150.

This is a rule in admiralty only. If Warner's building is torn down to stop the spread of fire, he recovers no contribution from owners of property thus saved.

A marine insurer is bound to make good to the owners of property saved the contribution they pay to one whose property was sacrificed. So also the marine insurer is bound to pay in full the loss of the one whose goods were sacrificed, and is then subrogated, or substituted, to his rights to compel contribution from those whose property was saved.

If the policy on a vessel or goods is merely a fire policy and not a marine policy, the rule of general average has no application.

REVIEW QUESTIONS AND PROBLEMS

86. Explain the system and object of insurance. How did it originate? How are premiums fixed?

87. Distinguish between valued and open policies. Distinguish life, endowment, and term policies.

88. Define insurance; insurer; insured; premium; policy; risk; insurable interest. What is life insurance? accident insurance? marine insurance?

fire insurance? casualty insurance? guaranty or fidelity insurance and its kinds? What is reinsurance? May the party originally insured recover against the reinsurer?

89. Name the characteristics of the insurance contract. Is it a wagering contract? Is it an indemnity contract, and why? How much may be recovered? How much in an open marine policy? If one has two fire-insurance policies on the same building, how is the loss adjusted? What is subrogation? May one recover insurance on his building burned by his own negligence? If the insured commits suicide, may his estate recover on the policy? May an insurance contract be by parol?

90. What is an insurable interest in property? Illustrate. What is an insurable interest in a life? Illustrate. When and for how long must the insurable interest exist?

Problem 1. Duffey owned a patent and leased the exclusive use of it to Dorman. Duffey then insured the property used by Dorman in order to protect the claim for royalties for the use of the patent. Dorman's property burned. The insurance company claims that Duffey had no insurable interest in Dorman's property. Result?

Problem 2. Taylor is a stockholder in a corporation. He insures the corporate property, which afterward burns. Had he an insurable interest?

Problem 3. An uncle insured his nephew's life. Upon the nephew's death the insurance company resisted payment of the policy upon the ground that the uncle had no insurable interest in the nephew's life. Result?

91. In what important respect do insurance contracts differ from ordinary contracts? What is the duty of the insured as to disclosures? How has the rule been modified? What are representations? What are promissory representations? What is the effect of innocent misrepresentations?

Problem 4. Cooksey's building is threatened from a neighboring fire. He at once secures insurance on it, concealing the danger. Is the policy binding on the insurance company?

Problem 5. Washburn secured insurance on the life of Clark. No information concerning Clark's habits was asked or given, but other questions were asked and truthfully answered. Clark was to Washburn's knowledge very intemperate. Is the policy binding on the insurance company?

Problem 6. Kimbo secures insurance on a vacant building and states orally that it will be occupied. It is not occupied, and it burns. Is the insurance company liable?

92. What is a warranty? How does it differ from warranty in a contract of sale? How must it be fulfilled? Distinguish it from representation.

What is a waiver? What is an estoppel? What is the effect of a breach of representation or of warranty?

Problem 7. Patrom in the written application for insurance on his building (which becomes a part of the policy) states that "there is a watchman nights." The fire occurred on Sunday morning before daylight when there was no watchman. Patrom tried to show a custom not to keep watchmen after twelve o'clock Saturday night. Should he be permitted to do so? Is the warranty broken?

Problem 8. Wall represents his building as "occupied as a dwelling house." (1) It is in fact vacant. Is the insurance valid? (2) It is occupied when insured, but afterward becomes vacant. Two days later it burns. May Wall recover the insurance?

93. What is the standard policy? Must it be used? How are its terms fixed?

94. What three implied warranties are there in marine insurance? What is general average? What is jettison?

Problem 9. (1) Holzer's cargo is worth $29,000; the freight to be paid on it is $1000. Holzer's goods are thrown overboard to save a ship in a storm. The ship and the rest of the cargo are saved. The ship is worth $50,000 and earns on the voyage $2000 net freight (not including that on Holzer's goods). Duschak's goods are worth $33,000 and Lowe's are worth $35,000. Figure the general average and how much Holzer will receive and how much he will lose; how much the ship will receive and how much it will lose. (2) In case Holzer's goods are fully insured and the insurance is paid him, what are the rights of the insurance company?

PART III. PARTICULAR CONTRACTS CONCERNING CREDITS

CHAPTER VII

CREDITS AND LOANS

95. Capital and credit; money and exchange; payment. In the conduct of a business it is necessary to consider the subjects of capital, credit, money, exchange, and the method and effect of payments.

1. *Capital.* In any business enterprise capital is the total amount, *measured in money*, that is invested in the business. This capital sum is divided into that which goes to provide a business plant, equipment, stock, etc. and that which remains in available cash after these are installed. The latter is the working capital, for the equipment and stock must be kept intact, or, if stock is sold, as in merchandising, it must be replaced in order that the business may go on. The working capital should be sufficient to enable the business to be carried on when collections are slow or when debtors become insolvent. Some of it may be invested in live interest-bearing securities which in case of need can be quickly sold or used as collateral security to obtain temporary loans.

An individual, partnership, or corporation starts a manufacturing business. The plant and equipment cost $100,000. The annual manufactured product amounts to $1,500,000. It costs $600,000 for raw material and $800,000 for labor, repairs, insurance, and other expenses, leaving an annual profit of $100,000. How much working capital should there be over and above the plant and equipment? This will depend upon the readiness of sales and collections, and upon other considerations. But if the manufacturer wishes to be able to carry on his business for three months with almost no income, he must have one quarter of his total annual cost of operation, namely, $350,000. There would then be invested $450,000, with an annual profit of about $100,000, or, say, on the average, 20 per cent.

2. *Credit.* Credit consists in the ability to secure some present benefit under an agreement that the payment therefor shall be postponed to some future day,—as the ability to borrow money or obtain goods or services to be paid for thereafter. It is the result of the favorable opinion of the mercantile community or of the particular lender or seller as to the solvency, honesty, and business capacity of the borrower or buyer. Commercial agencies publish estimates of the ability of business concerns to meet credit obligations, and these are largely used by those who are requested to extend such credit. The two principal agencies in this country are Bradstreet's and Dun's. In addition to these two agencies there are a number of trade agencies which specialize in the particular trades they serve. Every business man needs credit, and his rating in these publications is of great importance to him. If he gives false information in order to secure credit, he may be liable in an action for deceit to anyone injured thereby. If false information is given in the publications, injurious to his credit, he may have an action against the agency for damages. Should the agency through carelessness give false information to the subscribers about the credit of a person rated, and if one of the subscribers, by extending credit on the strength thereof, should suffer a loss, the agency might be liable to the subscriber.

Good credit is of the first importance to a business man. Whether he wishes to borrow money or to purchase goods on postponed payments, he must have the reputation of possessing the ability and inclination to meet promptly his financial obligations. Often he must give security, which may take the form of a pledge of things of value, like bonds, or of a mortgage on property, or of a guaranty by some third person. If one borrows money at a bank, he may be required to have his note indorsed by one or more persons, who are known as accommodation indorsers.

Aside from the credit system above mentioned, there is a system of using credit temporarily in place of money for present payments. This is by issuing checks. Including these, the larger part of the business of the country is done on credit, and money is, after all, only an aid to the credit system. Enormous transactions take place without the actual transfer of a

dollar in cash. Every business day the clearing house in every large city meets to strike the balance among the banks belonging to it. If bank A presents checks which it has received against banks B, C, and D to the amount of $1,125,382, and if all the banks combined present checks which they have received against bank A to the amount of $1,315,460, then bank A owes the clearing house $190,078. If bank B presents checks against banks A, C, and D to the amount of $1,847,625, and they present checks against it to the amount of $1,620,347, then the clearing house owes bank B $227,278. In this way the balances are struck and the clearing house receives the cash from the debtor banks and pays it out to the creditor banks, being at the close of the transaction not a penny richer or poorer. The total amount of checks which pass through the 218 clearing houses in the United States is over $400,000,000,000 annually. Only about 10 per cent of cash balances is paid in and out. Ninety per cent of the business is done by a system of check credits.

Even banks themselves sometimes need credit in order to meet their obligations. Since the Federal Reserve system went into effect emergency credit can be furnished to the banks by the Federal Reserve Banks.

3. *Money.* Money has two meanings. In the general sense it means whatever has currency as money in payment of debts; this is called currency or current funds. In a more restricted sense it means whatever is legal tender in the payment of debts, that is, money which a creditor must receive; this is called legal-tender money.

There are twelve different kinds of current money in circulation in the United States.

1. Gold coin, now coined in denominations of $2.50, $5, $10, and $20, called respectively quarter eagles, half eagles, eagles, and double eagles. An eagle weighs 258 grains, of which $\frac{9}{10}$ is gold and $\frac{1}{10}$ alloy. The others weigh proportionately. These coins are full legal-tender money to any amount.

2. Standard silver dollars. A silver dollar weighs $412\frac{1}{2}$ grains, of which $\frac{9}{10}$ is silver and $\frac{1}{10}$ alloy. These are full legal tender to any amount, unless otherwise expressly stipulated in the contract.

3. Subsidiary silver, namely, half dollars (192.9 grains), quarter dollars (96.45 grains), and dimes (38.58 grains), all $\frac{9}{10}$ silver and $\frac{1}{10}$ alloy. These are legal tender for amounts not exceeding $10 in any one payment.

4. Nickel coin, namely, the five-cent piece, weighing 77.16 grains, of which $\frac{75}{100}$ is copper and $\frac{25}{100}$ nickel. This is legal tender for amounts not exceeding 25 cents in any one payment.

5. Bronze coin, namely, the one-cent piece, weighing 48 grains, of which $\frac{95}{100}$ is copper and $\frac{5}{100}$ tin and zinc. This is legal tender for amounts not exceeding 25 cents in any one payment.

6. United States notes ("greenbacks"). These are full legal tender except for duties on imports and interest on the public debt.

7. Treasury notes of Act of 1890. These are full legal tender except when otherwise expressly stipulated in the contract.

8. Gold certificates, issued against gold and bullion deposited in the United States Treasury. These have been legal tender since 1919.

9. Silver certificates, issued against silver dollars deposited in the Treasury. These have almost entirely replaced the silver dollars for general circulation. They are not legal tender, but are receivable for public dues.

10. National-bank notes, issued by national banks against United States bonds deposited in the United States Treasury. These are not legal tender, but are receivable for all public dues except duties on imports, and one national bank is bound to receive the notes of other national banks.

11. Federal Reserve notes, issued against commercial paper, against which there is required a 40 per cent gold reserve. These notes are obligations of the United States and are receivable by all national and member banks and Federal Reserve Banks and for all taxes, customs, and other public dues.

12. Federal Reserve Bank notes, issued by the Federal Reserve Banks and secured by government bonds and notes which must equal the amount of the Reserve Bank notes issued. These notes are receivable for all public dues, and may be paid out by the government for all purposes except interest on the public debt or for the redemption of Federal Reserve Bank notes. They are not legal tender.

Of course, gold certificates and silver certificates do not increase the volume of money. They simply represent so much coined money (or gold bullion), which is held for their redemption, and they circulate instead of the less convenient coin. They are a kind of warehouse receipt for money.

The following table shows in round numbers the amount of money in circulation in the United States on September 1, 1924:

Gold coin and bullion	$401,000,000
Gold certificates	872,000,000
Silver dollars	53,000,000
Silver certificates	385,000,000
Treasury notes (1890)	1,000,000
Subsidiary silver	253,000,000
United States notes	308,000,000
Federal Reserve Bank notes	1,746,000,000
Federal Reserve notes	9,000,000
National-bank notes	741,000,000
Total	$4,769,000,000

4. *Exchange.* Exchange is an operation by which debts may be paid at distant points, through a transfer of credits; it always requires three parties and two payments. A claim or credit which one living in New York has against a debtor in London may be used to pay a debt one owes in London, or it may be sold to another debtor in New York and used by him to pay his creditor in London. A bank in New York may keep a credit with a bank in London, and so be able to sell to New York debtors its checks on the London bank, with which the New York debtors may pay their London creditors. It is of course far cheaper and safer to send to London an order on a London merchant or a London bank than to send gold coin.

Example. Fritchie in New York sells to Baine in London cotton to the amount of £600, and draws a bill of exchange (order for money) on Baine payable to Fritchie's order sixty days after sight for that amount. (1) Fritchie may sell this bill to a banker or bill broker in New York. If Atkins in New York owes Hawkins in London £600, Atkins may buy this bill of the broker and send it to Hawkins, who presents it in London to Baine and gets his money. (2) Fritchie may discount the bill at his bank in New York. The bank may send it and other like bills to its correspondent bank in London and thus get a credit there. Atkins may purchase of the New York bank its bill of exchange on the London bank and send this to Hawkins, who presents it at the London bank and gets his money.

Domestic exchange is that between different parts of the same country. It is sold by banks, express companies, telegraph companies, and even by the government in the form of post-office money orders.

Foreign exchange is between a city in one country and a city in another country. It is of two kinds: (1) bankers' bills, that is, bills of exchange or checks drawn by one bank on another; (2) commercial bills, that is, bills of exchange drawn by one merchant (creditor) upon another merchant (debtor). The latter may be drawn to collect for a shipment of goods and be accompanied by the bill of lading (in this case they are called documentary) or they may be without accompanying documents of title (in this case they are called clean bills). When a bill of exchange is drawn by a seller of goods upon the buyer, and is accepted by the buyer, it is called a trade acceptance.

Foreign exchange is reckoned, but is not always expressed, in the money of the country on which the bill is drawn. The rate of exchange is the expression of the value of the money of one country, recorded in the terms of the money of another country. The par of exchange is an arbitrary value placed upon the foreign money which is approximately the value in normal times. The par of exchange of the English pound is $4.8635; of the French franc, $0.1930; and of the Italian lira, $0.1930. The actual rate of exchange varies from day to day. Since the World War foreign money has been below par. In September, 1924, the rates averaged as follows: the pound, $4.4914; the franc, $0.053165; the lira, $0.0443. The demand for foreign exchange and the financial conditions in the respective countries determine the actual exchange rates.

5. *Payment.* Payment is the discharge of a debt in money or its equivalent. It is the duty of the debtor to seek out his creditor and tender payment at the proper time. It is not the duty of the creditor to give a receipt unless the statute so provides, but it is customary to do so. The tender, to be legally and technically correct, must be of the exact amount in legal-tender money. If the creditor refuses a lawful tender, his refusal has the effect of stopping interest on the debt, and, if the tender be kept good, of preventing costs in case he resorts to an action at law to collect the debt.

If the debtor owes the creditor different debts, he may direct that a payment be applied toward the cancellation of any one of them he may select. If the debtor gives no direction, the law will apply the payment in the manner deemed most equitable and just to both parties.

A receipt, when given, is strong but not conclusive evidence that the sum named in it has been paid. It may be attacked for mistake or fraud.

As stated above, the larger part of the payments in the commercial world are now made by the use of checks or bills of exchange, while money, save in the case of small transactions, is used mainly to settle balances at the clearing house or between foreign cities.

96. Interest and usury. Interest is the compensation allowed by law or fixed by the parties for the use of money.

Legal interest is the rate of interest allowed by law. Parties may agree for less than this, but not for more unless a higher rate by special agreement is permitted by statute. If they agree for interest with no rate specified, the legal rate will be understood. In many states a legal rate is fixed for cases where there is no specific agreement, and a maximum rate for cases where there is an agreement. These statutes often provide that an agreement for a rate higher than the legal rate but within the maximum rate shall be in writing.[1]

Usury is unlawful interest, that is, an agreement for interest greater than that allowed by law. Such a contract is illegal, but the effect of such illegality varies in different states. In some the lender cannot recover any interest at all; in some he can recover neither principal nor interest; in some he forfeits only an excess above the specified rate.

In a few states no maximum rate of interest is specified by statute, and parties may contract freely concerning the rate, except that an unconscionable rate might be evidence of oppression or undue influence. In most American states the rate is fixed by statute, ranging from 6 per cent to 12 per cent, and any agreement for interest above that rate would be usurious and illegal; but some of these states allow corporations to contract to pay any rate of interest agreed upon, and some allow banks to make large call loans upon negotiable security at any rate agreed upon. The object of fixing the maximum rate is to avoid oppression of borrowers, and it is thought that corporations and dealers upon stock exchanges (who secure call loans) are not likely to be subject to such oppression and should be left free to contract for any rate they may think the loan worth to them. Special rates, higher than ordinary rates, are also usually allowed to be charged by pawnbrokers.

Up to the time a debt becomes due and payable there is no interest allowed upon it unless the parties have provided for interest.

[1] See Interest Table at end of this chapter.

A sale of goods for $500 upon sixty days' credit would carry no interest during the sixty days unless it was provided that the credit should be "with interest." So a negotiable promissory note carries no interest until maturity unless interest is specified in the note. All debts bear interest after they are due and payable, such interest being regarded as a measure of damages for the wrongful withholding of the money.

Compound interest (that is, interest on interest) is not favored in the law and will be allowed only when the interest due has by some new agreement been added to the principal or where expressly agreed for in the original agreement.

Example. Embler agrees to pay Codweiser $1000 three years from date, with interest at 6 per cent per annum, payable annually. Embler pays no interest and the three years have elapsed. Codweiser may recover the principal with simple interest; namely, $1180 (plus also interest from the date when the debt was due to the date of the judgment). After judgment Codweiser is allowed interest on the total judgment debt at the legal rate.

97. Banks. Banks are financial institutions which receive money on deposit, loan money, sometimes issue money, deal in commercial paper, and arrange for exchange. Commercial banking consists essentially of the exchange of (1) credit for money and (2) credit for credit. A customer delivers his money to the bank and receives in exchange the bank's credit. The legal title to the money is in the bank. The depositor has a right to demand back an equal sum, but not the same money deposited. He has received the bank's credit for his cash. If a customer discounts his note or bills receivable at a bank, he is exchanging his credit, payable at some future time, for the bank's credit, payable on demand. There are several kinds of banks in this country.

National banks are chartered by the United States government with power to issue national-bank notes upon depositing as security therefor United States bonds. They are banks of deposit, discount, and loans, doing a general banking business. By applying to the Federal Reserve Board they may receive the power to act as trustee, executor, administrator, registrar of stocks and bonds, guardian, assignee, receiver, or committee for the estate of a lunatic, or in any other fiduciary capacity allowed by state law to trust companies and state banks with which they compete. They may

charge the rate of interest which the state where they are located has fixed for its own state banks. The penalty for usury is the recovery by the borrower of twice the amount of interest paid. National banks may be organized by not less than five persons. In any place having less than 3000 inhabitants they must have a capital stock of not less than $25,000; in a place of from 3000 to 6000, not less than $50,000; in a place of from 6000 to 50,000, not less than $100,000; in a place of over 50,000, not less than $200,000. There are more than 8200 national banks, with an aggregate capital of more than $1,300,000,000. The outstanding national-bank notes amount to more than $700,000,000.

State banks are chartered by the state in which they are located, and, like national banks, are usually banks of deposit, discount, and loans. Owing to a national tax of 10 per cent on all bank notes issued by state banks, none of them can profitably issue such notes. There are over 18,000 state banks, with a total capitalization of over $1,000,000,000.

Trust companies are chartered by states and are given many of the powers of banks of deposit, and are also authorized to act as fiscal agents, trustees, executors, administrators, etc. When a corporation wishes to issue bonds secured by mortgage, it usually selects a trust company as trustee for the bondholders. They often serve as agents or trustees in the organization or reorganization of corporations. Trust companies have increased greatly during the past few years, and now number over 1600, with a total capital stock of over $591,000,000.

Savings banks are, as the name implies, depositaries for savings and not ordinary banks of deposit for accounts which can be checked against. They pay interest on deposits and lend money at a higher rate on mortgages or other securities permitted by law. They are organized under state laws. There are more than 1600 savings banks in the United States, and they have total deposits of over $7,500,000,000 made by more than 13,000,000 depositors.

Private bankers are persons who carry on a banking business without forming a corporation. They may unite with banking proper a variety of other enterprises, and some of the largest financial operations are conducted through private bankers who

promote or finance them. They often combine with a banking business that of stock or bond brokers.

By act of December 23, 1913, the Federal Reserve banking system was established. This act provides for the creation of not less than eight or more than twelve Federal Reserve Districts, in each of which there shall be located a Federal Reserve Bank. The twelve Federal Reserve Banks are now located at Boston, New York, Philadelphia, Cleveland, Richmond, Atlanta, Chicago, St. Louis, Minneapolis, Kansas City, Dallas, and San Francisco. All national banks within the district are required to, and other banks may, become members of the Federal Reserve system. There are now over 9600 member banks. Each Federal Reserve Bank is required to have a capital of at least $4,000,000, which is subscribed by the member banks. Each Federal Reserve Bank is entitled to act as a depositary for reserves of the member banks, to rediscount notes, drafts, bills of exchange, and acceptances owned by the member banks and thus to furnish such banks with cash in time of financial strain; to receive deposits from any of its member banks or from the United States; and to issue Federal Reserve Bank notes protected by government bonds and Federal Reserve notes, based on commercial paper. The Federal Reserve system has as two of its primary objects the creation of a more elastic currency and the establishment of more effective supervision of banking.

By an act of Congress of 1916 there was established the Federal Farm-Loan system, intended to make it easier for farmers to borrow money for long periods on advantageous terms. The act established a Federal Farm-Loan Board of seven members which supervises the system. The country is divided into twelve districts with Federal Farm-Loan Banks at Springfield (Massachusetts), Baltimore, Columbia (South Carolina), Louisville, New Orleans, St. Louis, St. Paul, Omaha, Wichita (Kansas), Houston, Berkeley (California), and Spokane (Washington). Farmers desiring to borrow form a Farm-Loan Association and subscribe to its stock. The association in turn subscribes to the stock of the land bank in its district, and that bank lends to the farmers from $100 to $25,000 on first mortgage, for approved agricultural purposes, the loans being limited to 50 per cent of the value of the

land mortgaged and 20 per cent of the value of the permanent insured improvements. The loans bear not more than 6 per cent interest, run from five to forty years, and must be paid off in annual or semiannual installments. Most of the capital of the Federal Farm Land Banks was originally furnished by the Federal government. The banks are authorized to issue bonds, to an amount not exceeding twenty times their capital stock, secured by the mortgages they hold. These Federal Farm Land Bank bonds are exempt from taxation and are legal investments for trust funds. From the sale of such bonds the banks secure more money to lend to the farmers.

The same act of Congress permitted private individuals, without government aid, to form joint-stock land banks which are also supervised by the Federal Farm-Loan Board. These banks make long-term loans to farmers, taking first mortgages, and receiving payments in installments. They also sell their own bonds, secured by the farmers' mortgages. These bonds are tax exempt and legal investments for trust funds.

If a bank receives deposits subject to check, it usually allows no interest; but banks and trust companies sometimes receive deposits not subject to check and allow interest, and sometimes pay a small rate of interest on the average daily balance of a checking account. A bank of deposit makes its profits on loans. Even if it pays interest, it lends at a higher rate than it pays. Loans of banks of deposit are made on indorsed commercial paper or on collateral security. Under the Federal Reserve Act national banks are allowed to lend, on real-estate security, a limited portion of their capital, surplus, and time deposits. Savings banks and trust companies lend on such security with greater freedom.

98. Bank deposits. When money is deposited in a bank, the depositor becomes the creditor of the bank to the amount of his deposit. In ordinary banks of deposit there is an implied understanding that the depositor may draw checks upon his deposits in favor of third persons, and that the bank will honor them. There is no such understanding in the case of ordinary debtors, and the debtor is not bound to honor any order upon him unless it be for the full amount of his debt. In savings banks and in the case of

most interest-bearing deposits in other banks it is usually provided that some notice shall be given of an intention to withdraw any portion of the deposit, and that the deposit book shall be presented with the check or order.

When money is deposited in a bank subject to check, the depositor usually receives a bank book in which each deposit is entered. This constitutes the evidence of his credits. When a check is paid, the bank keeps it, and this constitutes the evidence of its credits as against its depositor. The book and vouchers (paid checks) are then returned to the depositor, who should at once examine each check in order to ascertain that it is genuine, and should verify the account. If a forged or raised check has been paid, the loss falls upon the bank as between the bank and the depositor, but unreasonable delay in examining the checks after they are returned to him, or in notifying the bank of any irregularity, may estop the depositor from asserting his rights in this respect.

A depositor may have a note made by him payable at his bank. In that case, when the note falls due it is equivalent to an order upon the bank to pay it; it is paid like a check, and the note is included as a voucher when the account is written up. A depositor may, however, direct a bank not to pay from his deposit a note or check which he has made payable there. In this event the bank is bound to refuse payment unless it is itself the owner of the note, in which case, as creditor to that amount, it may offset the note against what it owes to the depositor.

Where one does not wish to draw checks against a deposit, he may take a "certificate of deposit" from the bank. This is in the form of a receipt stating that "A.B. has deposited in this bank five hundred dollars payable to his order upon return of this certificate," and is signed by the cashier. If certificates are for a definite period, as three months, they are often made with interest. They are practically the promissory notes of the bank.

99. Loans and discount; security. If one wishes to borrow money for temporary use in his business, he usually applies at his bank for a loan. If he wished to borrow $1000, he would make his promissory note for that amount (with or without security),

payable at a specified time after date, and the bank would discount it and place the amount, less the discount, to his credit.

Discount is the price paid for the present use of money or credit in exchange for the promise of future payment. In other words, it is the taking of interest in advance upon a loan; it is incidental to banking, and bank discount is not usury, although the lender may thereby secure slightly more than the legal rate. It is technically discounting one's own commercial paper in order to raise money.

Discount is also used in the sense of purchasing for their present worth, or for less, notes made by one person and owned by another.

Examples. Braddock wishes to raise money. He owns a note made by Donald; he sells this note to Bodman. If he sells it for its present value, there could be no question in any event of the validity of the transaction. But if he sells it for less than its present worth, the buyer will make a profit greater than the legal rate of interest. This, however, is not essentially usurious, any more than to buy a horse and make a profit upon it. If Braddock does not indorse the note so as to become liable upon it himself, the sale may be for any price agreed upon. If Braddock does indorse it, most courts still hold that the sale (if not a mere cover for usury) may be for any price agreed upon, although some courts hold this to be usurious if the buyer makes thereby more than the legal rate of interest.

If in borrowing money one has to give security, this may be done by getting another person to indorse or guarantee his note, or by depositing collateral in the form of a pledge, or by giving a mortgage upon property. When there is an accommodation indorser, the note is usually made payable to the accommodation indorser, indorsed by him, and discounted at the bank by the accommodated party. If it is not paid by the maker when it is due, the indorser is notified and he is then liable to pay it. If the note is guaranteed, it is made payable to the bank, and the guaranty is written upon the back and signed by the guarantor. Upon nonpayment by the maker, the guarantor is liable without notice. Pledge of collateral security has already been treated (see section 77 *ante*). A mortgage is in form a conveyance of property on condition that if a specified sum be paid to the mortgagee at a specified date, the mortgage shall be void and of no further effect.

INTEREST TABLE

The following table shows the ordinary legal rate of interest and the maximum rate by special agreement in each state and territory. The special agreement must in most states be in writing.

State etc.	Legal Rate	Maximum Rate	State etc.	Legal Rate	Maximum Rate
Alabama	8	8	Nebraska	7	10
Alaska	8	12	Nevada	7	12
Arizona	6	10	New Hampshire	6	Any rate
Arkansas	6	10	New Jersey	6	6
California	7	12	New Mexico	6	12
Colorado	8	12	New York	6	6
Connecticut	6	12	North Carolina	6	6
Delaware	6	6	North Dakota	6	10
District of Columbia	6	10	Ohio	6	8
Florida	8	10	Oklahoma	6	10
Georgia	7	8	Oregon	6	10
Hawaii	8	12	Pennsylvania	6	6
Idaho	7	10	Philippine Islands	6	14
Illinois	5	7	Porto Rico	6	12
Indiana	6	8	Rhode Island	6	30
Iowa	6	8	South Carolina	7	8
Kansas	6	10	South Dakota	7	12
Kentucky	6	6	Tennessee	6	6
Louisiana	5	8	Texas	6	10
Maine	6	Any rate	Utah	8	12
Maryland	6	6	Vermont	6	6
Massachusetts	6	Any rate	Virginia	6	6
Michigan	5	7	Washington	6	12
Minnesota	6	10	West Virginia	6	6
Mississippi	6	8	Wisconsin	6	10
Missouri	6	8	Wyoming	8	12
Montana	8	12			

In no case may a bank discount or purchase notes at a greater discount than the legal rate of interest. This limitation upon banks has created a class of dealers known as bill brokers, or popularly as "note shavers," who purchase such instruments at an agreed price for themselves or for other persons.

Small loans. There are numerous plans for making small loans to persons who have little or no property. One is the so-called Morris Plan. By it small sums are lent to workingmen, trades-

men, and professional men, on notes secured by the signatures of two friends of the borrower who are in the same work. The borrower must have a certain earning capacity and be of good character. He must use the loan for an authorized purpose, as, for example, to pay doctor's bills or other expenses of sickness. The borrower must make payments on the loan in frequent installments. While no property security is given to the lender, he relies upon the security of earning power and good character.

100. The marketing of securities: syndicates and underwriting. A corporation desiring to sell its stocks or bonds may sell them itself to the public; but, because of the facilities which banks and investment houses have for selling securities, it is customary to use them in marketing securities. The corporation which is issuing the stock or bonds sells the issue to a syndicate or group of banks or investment houses; this syndicate underwrites the issue (that is, guarantees that it will sell at a certain price) and then takes the securities from the corporation and with the aid of other banks and investment houses sells the securities to the public throughout the country.

Example. The Borton Electric Company wishes to borrow $5,000,000. It issues bonds to that amount and makes an agreement with five banks and investment houses that it will turn the bonds over to them as a syndicate for sale. The syndicate underwrites the issue at 95, that is, guarantees that the bonds will sell at 95, or, in other words, that the Borton Company will receive $950 for each of its $1000 bonds. The original syndicate is called the underwriting syndicate. It advertises the bonds and secures the aid of other banks and investment houses throughout the country to do the actual selling to investors. This selling syndicate is called the distributing syndicate. It pays the underwriting syndicate 98 for the bonds, thus leaving a profit to the underwriting syndicate of $150,000 on the issue. The distributing syndicate sells the bonds at par to the public, thus giving its members a profit of $20 on each $1000 bond, or a total profit of $100,000 on the issue.

REVIEW QUESTIONS AND PROBLEMS

95. What is capital? What is working capital? What is credit? How is it estimated? How are checks used for credit purposes? Explain the methods of a clearing house. What is money? What is currency? What is legal tender? State the kinds of United States money. Which are legal tender and to what amount? What is exchange? What two kinds of for-

eign exchange are there? What sends foreign exchange above par or below par? What determines the commercial price of exchange? What is payment? What is the effect of refusing it? How is it applied if there are different debts? Must the creditor give a receipt? What is its effect?

Problem 1. McDonough owes Leonard $32. McDonough tenders Leonard silver in payment as follows: 15 silver dollars, 20 half dollars, 25 quarter dollars, 7 dimes, 1 nickel. Leonard refuses to accept this, alleging it is not legal tender. Leonard then sues McDonough, and to avoid costs and interest McDonough pleads the prior tender. Result?

Problem 2. Quim owes Brook a debt of $25 contracted in 1919, and one of $36 contracted in 1921. Quim pays Brook $25 and directs Brook to credit it on the debt of $36. Brook credits it on the debt of $25. In 1925, after the debt of $25 is outlawed, Brook sues Quim for $36. Quim pleads payment of $25. How much may Brook recover?

Problem 3. In the above case Quim makes no request as to application of payment. How will it be applied?

96. What is interest? What is usury? What is the effect of usury upon a contract? What is the legal rate and the maximum rate of interest in your state? What debts carry interest? What is compound interest? When is it allowed?

Problem 4. Fogg bought goods of Duvall to the amount of $215 on three months' credit, which expired July 7. On September 3 Duvall brought suit in your state against Fogg for this debt. On November 10 a judgment was entered for Duvall. On January 15 this judgment was paid. The disbursements and costs allowed Duvall by the court amounted to $24.25. (1) How much should the judgment be entered for? (2) How much should be paid to discharge it on January 15?

Problem 5. Kallman borrows of Scudder in your state $100 for one year, and gives his promissory note for that amount with 6 per cent interest. In addition Kallman pays Scudder a bonus of $5; that is, Scudder really pays over to Kallman on the loan only $95. Scudder sues Kallman on this note. Kallman pleads usury. Result?

Problem 6. In the above case the borrower is a corporation. Result?

97. What is a bank? Name and describe the different kinds of banks. How much capital must a national bank have in your city or village? Is there a state bank there? a savings bank? a trust company? a private banker? What advantages have trust companies over state or national banks? What is the Federal Reserve system? Describe the Federal Farm-Loan Banks and their operation. What is a joint-stock land bank? What are live accounts? What banks take deposits and allow interest?

98. What is the relation of a bank to a depositor? Who loses the money paid by a bank upon a forged check? If one has a note due and payable at a bank, explain what is done on the due date. What is a certificate of deposit?

99. Explain the process of borrowing money at a bank. What is discount? How great may it be? What is purchasing a note? For what price may a bank purchase a note made by Mellen and owned by Anderson? For what price may an individual purchase it? In what forms may one give security for a loan? What is a mortgage? What is a Morris Plan loan?

100. Describe the usual method of marketing large issues of securities. What is a syndicate? What is underwriting?

CHAPTER VIII

THE CONTRACT OF GUARANTY

101. Guaranty defined. A guaranty[1] is a promise to be answerable for another's debt, default, or obligation. It is a contract collateral to the main contract of the principal party.

Example. Wheeler purchases goods of Bradford on credit; Wells gives Bradford a guaranty that Wheeler will pay for them, or, in case Wheeler does not, that Wells will. The main contract is between Wheeler and Bradford regarding the purchase of goods. The collateral contract is by Wells to the effect that he will guarantee Wheeler's debt.

The guarantor is he who gives the guaranty. The guarantee is he to whom the guaranty is given, that is, the creditor. The principal is he whose debt is guaranteed, that is, the debtor. The word "surety" is sometimes used interchangeably for "guarantor," but strictly a surety is one who is bound with the principal upon the original contract and in the same terms, while a guarantor is bound upon a collateral contract to make good in case the principal fails.

"We, William Backus as principal and John Hohn as surety, hereby agree, etc." would be a case of suretyship; while "I, William Backus, hereby agree, etc.," followed by the indorsement, "I hereby guarantee[2] the performance of payment of the within contract. JOHN HOHN," would be a case of guaranty.

An indorsement of a negotiable instrument is a special form of guaranty, the indorser promising that he will be answerable for the amount of the note in case the holder makes due presentment to the maker, gives due

[1] This is the same word as "warranty," having preserved the Norman-French *g*, which has been converted into the English *w* in "warranty," as the French *Guillaume* becomes "William" in English. A warranty is a guaranty of the title or quality of goods. A guaranty is a warranty of credit, solvency, etc. (see Guaranty Insurance, sect. 88 *ante*).

[2] The verb is either "guaranty" or "guarantee." Sometimes one, sometimes the other, is used. The noun also is written in both forms.

notice of dishonor to the indorser, and, in case of a foreign bill of exchange, makes due protest. This is considered under the head of "Negotiable Instruments."

A guaranty of payment differs from a guaranty of collection. In the first case the guarantor agrees to pay if the principal does not; in the second he agrees to pay if the debt cannot be collected of the principal.

A continuing guaranty is an agreement to be responsible for moneys, goods, or services to be furnished to the principal from time to time in the future.

102. A guaranty must be in writing. Under the Statute of Frauds (see section 23 *ante*) a promise to answer for the debt, default, or miscarriage of another must be in writing and signed by the party to be charged. Hence a guaranty of another's debt or promise must comply with this provision.

If the contract is strictly one of indemnity, that is, a promise to save another harmless from the results of some transaction into which the promisor induces him to enter, it is to be distinguished from a guaranty and need not be in writing. In such a case there are but two parties.

Examples. 1. Phelps promises Briggs, an officer, that if the latter will attach Cannon's goods, he will guarantee him against loss or damage. This is a contract of indemnity and not a guaranty, and need not be in writing. There are really but two parties here.

2. Sometimes it is very difficult to say whether a contract is one of guaranty or of indemnity. Riggs promises Waldo that if the latter will go upon Tabor's bail bond, he (Riggs) will make good any loss Waldo may suffer. In England and in many American states this is treated as a contract of indemnity, while in other states it is treated as a contract of guaranty.

3. Again, the promise may be an original instead of a collateral one, and in that case it is not a guaranty and need not be in writing. "If you will let Denny have these goods, I will pay for them." The promisor is primarily and not collaterally liable. Had he said, "I will pay for them if Denny does not," it would have been a guaranty.

4. Again, the promise may be to pay the debt out of funds put into the hands of the promisor for that purpose. Jameson has moneys of Warren put into his hands to pay for goods sold to Warren by Wilbur. Jameson promises Wilbur to pay. This is not within the Statute of Frauds. It is really a case of a trust or agency.

In all doubtful cases it is safer to have the promise put into writing and signed. In some states it is necessary, also, that the writing should express the consideration upon which the guarantor's promise is based.

103. Consideration. When the contract of guaranty is made at the same time as the contract which it guarantees, the consideration which supports the principal's promise will also support the guarantor's.

When the contract of guaranty is made after the main contract, a new consideration is required to support the guaranty.

Examples. 1. "If you let Irwin have these goods, I will guarantee payment for them. JOHN COBB." The delivery of the goods supports Irwin's promise to pay and also Cobb's.

2. Jackson owes Carmichael for goods already sold and delivered. Hennessey writes to Carmichael, "I will guarantee Jackson's debt to you." There must be some new consideration for this or the promise will be unenforceable. Such a consideration might be that Carmichael should bind himself to give Jackson an extended time in which to pay.

104. Notice of acceptance by guarantee. Whether the creditor (guarantee) must notify the guarantor that he accepts the guaranty has been a very much discussed question. It is not necessary, of course, in the case of a contemporaneous guaranty, that is, a guaranty made at the same time as the main contract. The difficulty arises in a case of a guaranty as to future credit.

Example. Jeffry writes Underwood, "I will guarantee payment of all goods you may let Ickes have during the next year." Must Underwood notify Jeffry that he accepts the guaranty, or will the delivery of goods to Ickes constitute an acceptance? In a majority of states it is held that notice must be given in such a case, because the guarantor is entitled to know that his offer of guaranty has been accepted. In England and in some of our states no notice is necessary, the acceptance consisting in the doing of the act specified; that is, letting Ickes have the goods. In view of this conflict it would always be safer to notify the guarantor that the guaranty has been accepted.

105. Notice to guarantor of the default of the principal. Whether the guarantee must notify the guarantor that the principal has defaulted in the payment or other obligation covered by the guaranty is also a disputed question. Some states require no notice,

while others require notice but do not agree as to the cases in which it must be given.

In states requiring notice these different holdings are found:

1. That the guarantor is always discharged for want of such notice if he is damaged thereby.

2. (1) That the guarantor is discharged for want of such notice if the amount for which he is bound is an uncertain one; but (2) that he is not discharged for want of notice if the amount for which he is bound is certain.

In view of this conflict and the closeness of the questions involved, it is safer for the creditor to notify the guarantor, upon default of the debtor, that such default has occurred and that the creditor looks to the guarantor for payment.

There is also much conflict as to the conditions under which the guarantee is bound to disclose to the guarantor at the time of making the guaranty any fact known to the guarantee concerning the honesty, fidelity, or solvency of the principal. In some cases a guarantor has been relieved of liability because the guarantee concealed such knowledge, but the cases are by no means clear as to what constitutes fraudulent concealment.

Examples. 1. Arnot has been state treasurer, and, known to the state officers who are required to take and approve his bond, he has been guilty of using state money for his own purposes. They take a bond from Rathbone and others as sureties for the fidelity of the treasurer, concealing this knowledge. This is fraudulent concealment, and Rathbone and the other sureties are not liable. The same result would be reached if an employer, knowing of the dishonesty of his clerk, afterward took a fidelity bond to assure his honesty, concealing his former dishonesty.

2. Gaff is known to Sims to be financially weak or insolvent. Sims takes an obligation from Gaff with Taussig as guarantor, concealing this fact. Taussig is not relieved. This is not fraudulent concealment. So it has been held not to be fraudulent to conceal the fact that the principal has been gambling or is already indebted to the guarantee. If, however, the guarantor asks the guarantee about such matters, he must answer fully and fairly if he answers at all.

106. What will discharge the guarantor. A guarantor may be discharged from his liability, and it remains to consider what will operate to work such a discharge.

1. *Discharge of the principal.* If the principal is voluntarily discharged or released, the guarantor is also discharged unless he consents to such release; but he is not discharged by an involuntary release, as a release in bankruptcy by force of law.

A promise by the creditor not to sue the debtor, coupled with a reservation of the rights against the guarantor, is held in England and in some of our states not to discharge the guarantor, and an agreement for release with such reservation is construed to be a promise not to sue; but this exception is not recognized in some of our states.

Examples. 1. Bollbee guarantees Godfrey's debt to Kenworthy, who discharges Godfrey from liability, giving him a release under seal. Bollbee is also discharged.

2. In the above example Godfrey becomes financially embarrassed and creditors agree to take 60 cents on the dollar and release Godfrey. Kenworthy receives his 60 per cent. Godfrey is released. So is Bollbee.

3. In Example 1 Godfrey goes into bankruptcy and is discharged by payment of 60 per cent. Godfrey is released but Bollbee is not. Kenworthy may recover the additional 40 per cent from Bollbee.

2. *Alteration of contract.* If the creditor has altered the terms of the contract with the debtor without the consent of the guarantor, the latter is discharged.

Examples. 4. Jewett guarantees payment for a specified engine, to be sold by Hedges to Lee. Afterward Lee decides to take a different engine at a different price. Jewett is discharged.

5. Shorter guarantees payment of a note from Rountree to Collenson, due on September 11. Rountree and Collenson by mutual consent change the note to read October 11. Shorter is discharged. His contract is destroyed by an alteration made without his consent. It would be the same if the date were changed to August 11.

3. *Extension of time to debtor.* If the creditor definitely extends the time of payment for the debtor without the consent of the guarantor, the latter is discharged.

Examples. 6. Joslyn has guaranteed to Harlan the payment of a debt due from Swartwood on April 1. Harlan, in consideration that Swartwood will give him a note, extends the time to June 1. Joslyn is discharged.

7. *Exception:* There is an exception to this rule in the case where the creditor, while extending the time to the debtor, expressly reserves his right against the guarantor. This is because the rights of the guarantor against his principal are not injured, since the principal impliedly agrees that the guarantor may at once pay the debt to the creditor and proceed against the principal for indemnity.

A mere failure to sue, or an unenforceable promise to refrain from suing, is not an extension of time to the debtor.

4. *Surrender of securities by creditor.* If the creditor surrenders to the debtor securities (such as stocks and bonds) held as a pledge for the enforcement of the debt, the guarantor is discharged to the extent to which he may be injured thereby.

5. *Failure of creditor to proceed against debtor after notice.* According to the prevailing rule, if the guarantor directs the creditor to proceed against the debtor, and the creditor fails to do so, the guarantor is not discharged if the debtor afterward becomes insolvent. The guarantor can pay the debt and proceed against the debtor himself if he thinks immediate action desirable.

6. *Revocation by guarantor.* If the consideration for a guaranty consists of an act to be done in the future by the guarantee, a notice of revocation of the guaranty before the act is done will be effectual and will relieve the guarantor. If the consideration consists of a series of acts to be done by the guarantee, notice of revocation of the guaranty will be effectual as to those acts not yet done, but will be ineffectual as to those already done.

Example 8. Osborn writes to McCaskill, "If you let Wilson have goods for his store during the coming year, I will guarantee payment." On January 10 McCaskill lets Wilson have goods to the value of $150, and on February 5 to the value of $175. On March 1 Osborn notifies McCaskill that he will no longer be liable for goods sold to Wilson. On March 15 McCaskill lets Wilson have $250 worth of goods. Osborn is liable as guarantor for $325, but not for the $250.

7. *Death of guarantor.* The death of the guarantor has the same effect as an express revocation of the guaranty, though some states require that the guarantee shall have actual notice of the death in order that it may operate as a revocation.

Example 9. In Example 8, suppose Osborn died on March 1. In many states this would operate to revoke the guaranty as to any advances made.

thereafter. In other states it would operate only from the time McCaskill had notice of it. In any event Osborn's estate would be liable for the advances made before his death.

Surety. In the case of a surety, as distinguished from a guarantor, some special results of revocation or death must be noted:

a. It is a technical rule of the law (when not modified by statute) that where an obligation is joint, the death of one joint obligor extinguishes the liability as to him, and the survivor alone is liable. If Moore as principal and Topliff as surety jointly promise to pay Chasten, the death of Topliff relieves his estate. This technical rule has now been very generally changed by statute so that the death of a joint obligor does not in any case extinguish the claim as to his estate. Under the above rule the death of a joint surety would of course revoke liability as to future advances.

b. If the suretyship is joint and several, the death of the surety does not revoke the suretyship, as does the death of a guarantor. For example, if the promise is "We, Moore as principal and Topliff as surety, jointly and severally promise to pay Chasten $100," the death of Topliff does not relieve his estate from the obligation. A guaranty is collateral, but a suretyship is a part of the original contract itself and stands or falls with it.

c. (1) In the case of an indemnity bond for an indefinite period the surety may at any time give notice of revocation, leaving the employer whose employee's honesty was assured a reasonable time to get other sureties. (2) But in the case of indemnity bonds for a definite period the surety cannot withdraw unless the employee or officer has defaulted so that he may be removed, or unless the surety has reserved in the bond the right to withdraw upon due notice. (3) The death of a surety on a joint and several bond does not terminate the liability of his estate even as to a breach by the principal occurring after the death of the surety.

An indemnity is in some respects like a suretyship and in some respects like a guaranty.

8. *Retention of principal after knowledge of his dishonesty.* If the guaranty be against the dishonesty or theft of the principal, the guarantor will be discharged if the guarantee, after knowledge of the principal's dishonesty, continues him in his service.

9. *Main contract unenforceable against principal.* If the main contract is illegal, and so not enforceable against the principal, the collateral contract of guaranty is also unenforceable. This rule has been applied to usurious contracts, where the main contract provided for the payment of an illegally high rate of interest. So also, if the main contract was procured from the principal by

fraud and cannot for that reason be enforced, the guaranty of it is also unenforceable if the principal has avoided the main contract on the ground of fraud. The same has been held of contracts procured by duress, but some cases have escaped this rule where the guarantor signed with knowledge of the duress. Failure of consideration, which renders the main contract nonenforceable, also relieves the guarantor. But the fact that the principal is an infant, or of unsound mind, or a married woman, and so may escape liability, will not release the guarantor. These are defenses personal to the principal, and the guarantor cannot avail himself of them.

107. Guarantor's liability. The guarantor's liability is fixed by the terms of the contract. This may stipulate for a definite sum or for such sum as the debtor is liable for. The guarantor may be compelled to pay without resorting to the principal debtor, unless, indeed, he has merely guaranteed the collection of a debt, in which case the creditor must first exhaust his remedies against the debtor.

Examples. 1. "I hereby guarantee the within note. CLARK BELLOWS." The holder may proceed against Bellows without first proceeding against the maker of the note.

2. "I hereby guarantee the collection of the within note. CLARK BELLOWS." The holder must first exhaust his remedies against the maker before proceeding against Bellows.

108. Guarantor's remedies. A guarantor who has paid his principal's debt or obligation is entitled to the following remedies:

1. *Indemnity against principal.* The guarantor may recover from his principal all money properly paid on account of the guaranty, together with any costs reasonably incurred in defending the creditor's claim. In order to safeguard himself the guarantor should notify the principal of an intended payment, in order that the principal may put in the way of the creditor's claim any defense he thinks fit.

2. *Subrogation to rights of creditor.* The guarantor is entitled to be subrogated, or substituted, for the creditor in his right to all collateral securities held by the creditor for the payment of the debt.

Example 1. MacChesney borrows money of Young and gives as security certain bonds in pledge and also the guaranty of Miller. Miller pays the debt to Young. Miller is entitled to the bonds in pledge as security for his claim against MacChesney.

3. *Contribution from coguarantors.* If two or more persons are joint guarantors for the principal, and one of them pays the entire debt, he is entitled to a proportionate contribution from his coguarantors. If one be insolvent or out of the jurisdiction, the others may be compelled to contribute to make up the proportion of the absent or insolvent coguarantor.

Example 2. Durkee, Flory, and Barnes are coguarantors for a debt of $1200 owed to Dominick by Alger. Durkee pays the entire debt. He is entitled to recover at law $400 each from Flory and Barnes. If Barnes be insolvent and unable to pay, then Durkee may recover in equity $600 from Flory.

Forms of Guaranty

A general guaranty, or "letter of guaranty," of future advances may be as follows:

I hereby guarantee to any person advancing money (or selling goods, or whatever the act may be) to [*Principal*], not exceeding in value ——— dollars, the payment therefor at the expiration of the credit which shall be given.

(Date)_____ (Signature) [*Guarantor's Name*]

(Address)_____

A special guaranty of future advances may be as follows:

To [*Guarantee or Creditor*]

I will be responsible for goods (specify a particular kind if desired) sold by you to [*Principal*] to an amount not exceeding in value a total of——— dollars.

(Date)_____ (Signature) [*Guarantor's Name*]

(Address)_____

A guaranty of credit made at the same time the credit is given may be as follows and would usually be attached to the contract granting the credit:

In consideration of the agreement of [*Principal*] above set forth, I hereby guarantee to the said [*Creditor*] that the above-named [*Principal*] will well and faithfully perform everything by the foregoing agreement on his part to be performed at the times and in the manner above provided.

(Date) _____ Signature [*Guarantor*]

A guaranty of a past credit should state a new consideration.

In consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby guarantee etc.; *or*,

In consideration of the extension of time given by [*Creditor-Guarantee*] to [*Debtor-Principal*] upon the above agreement, I hereby guarantee etc.; *or*,

In consideration of the discontinuance of proceedings by [*Creditor-Guarantee*] commenced by him against [*Debtor-Principal*], I hereby guarantee etc.

REVIEW QUESTIONS AND PROBLEMS

101. Define guaranty; guarantor; guarantee; principal. Distinguish a surety from a guarantor; an indorser from a guarantor; guaranty of payment from guaranty of collection. What is a continuing guaranty?

102. Must a guaranty be in writing? Must an indemnity contract? Distinguish an indemnity contract from a guaranty.

Problem 1. Calvert buys goods of Gordon. Burke says, "If you let Calvert have the goods, I will pay you if he does not." Calvert does not pay. Gordon sues Burke. Result?

103. Does a guaranty require a consideration? What constitutes the consideration in a guaranty made at the same time the credit is given? in a subsequent guaranty?

Problem 2. Cairnes buys goods of Knight, payable in thirty days. At the end of the thirty days Chandler writes Knight, "If you will give Cairnes thirty days more, I will be answerable for his paying the claim." Knight takes Cairnes's note for thirty days more. It is not paid. Knight sues Chandler. Result?

Problem 3. In the above case Knight does not take a note, but simply refrains from suing Cairnes for thirty days. Result?

104. Is it necessary to communicate to the guarantor an acceptance of the guaranty? When?

105. Is it necessary to give the guarantor notice of the default of the principal? If so, under what circumstances? Is the guarantee bound to inform the guarantor of facts known to him affecting the risk? Illustrate.

106. What will discharge a guarantor? Will bankruptcy of principal? Will promise not to sue principal? Will release of principal reserving rights against guarantor? Illustrate change of contract releasing the guarantor. What is an extension of time to the debtor? What is the effect of surrendering securities by creditor? Is creditor bound to proceed against debtor if requested by guarantor? When may a guaranty be revoked? What is the effect of the death of a guarantor? of a surety? What is the difference between joint promises and joint and several promises? What are the rights of a surety on an indemnity bond? When will inability to enforce the main contract discharge the guarantor and when not?

Problem 4. Canfield guarantees Nye's debt to Seeley. Afterward Seeley gives Nye a release and then sues Canfield on the guaranty. Result?

Problem 5. In the above case Seeley releases Canfield and then sues Nye. Result?

Problem 6. Butler guarantees Manning's debt to Pease. Afterward Pease gives Manning "a release in full of said claim, reserving, however, all rights in respect thereto against Butler." Pease sues Butler on the guaranty. Result?

Problem 7. Babcock guarantees Olney's debt to Kent. Afterward Kent gives Olney a valid and enforceable extension of time. When this time expires Olney does not pay and Kent sues Babcock. Result?

107. May the guarantee proceed against the guarantor without first proceeding against the principal? Illustrate.

Problem 8. Haas gives Rogers a promissory note. Cawley writes and signs on the back of the note, "I hereby guarantee the collection of the within note." Haas does not pay the note. Rogers sues Cawley. Result?

108. What are the guarantor's remedies against the principal? What is his right of subrogation? of contribution?

Problem 9. Cantril gives Byers a promissory note secured by a mortgage on Cantril's property. Byrne guarantees the payment. After maturity Byers sues and recovers from Byrne. What are Byrne's rights against Cantril?

Problem 10. Graves owes Ludlow, and Marks, Foster, and Wingo guarantee the debt. Ludlow recovers from Marks. What are Marks's rights?

CHAPTER IX

NEGOTIABLE INSTRUMENTS

I. Nature and Characteristics

109. Kinds of negotiable instruments. Negotiable instruments are written promises to pay which can be transferred from hand to hand like money. They are used in trade as a substitute for money or may be used as an evidence of a debt the payment of which is postponed. They may be issued by private persons, or by banks, or by the government.

Examples. 1. If Curtis buys a bill of goods of Davison, he may (1) pay money, which may be either coin, promises of the government to pay, or promises of a national bank to pay; (2) give a check on his bank; (3) give his promissory note; (4) accept a bill of exchange drawn on him by the seller; (5) transfer Miller's check, promissory note, or bill of exchange drawn or payable to his (Curtis's) order or to bearer; or (6) draw and deliver a bill of exchange on Levitt (who owes Curtis), payable to Davison's order. In any case, as above, Curtis has given Davison a negotiable instrument, except where he pays coin. But even coined money is in fact a negotiable chattel, for, whatever title or want of title there may have been in Curtis, the taker of it for value gets a good title.

2. If any instrument given above is payable on demand, it is essentially an instrument of trade taking the place of money; but if it is payable at some future day, it becomes essentially an instrument of credit, because Curtis secures a postponement of the payment of his debt, that is, secures a term of credit from Davison. But even an instrument payable on demand is also one of credit, because until actually presented for payment it is taken on the credit of the one issuing it.

The principal kinds of negotiable instruments are as follows:

1. Bills of exchange, foreign and inland. These are *orders* by one person to another to pay money to a third person or someone named by him, or to bearer (sect. 111).

2. Promissory notes, including notes and certificates of deposit

given by banks. These are *promises* by one person to pay money to another or someone named by him, or to bearer (sect. 111).

3. Checks, or orders by depositors on their banks to pay money to a third person or someone named by him, or to bearer (sect. 111).

4. Bonds, or promises in a special form by corporations, cities, or governments to pay money to a person, or to a person named by him, or to bearer (sect. 111).

The instrument first used in England was the foreign bill of exchange, by which merchants in one country were enabled to pay debts in another country without the risk of sending money across seas. The Florentines or the Venetians introduced these instruments into England as early as the thirteenth century. The inland bill was later introduced to serve the same purpose between different parts of the same country. In this country an inland bill is one drawn and payable within the same state. A bill drawn in New York and payable in Chicago would be by our law a foreign bill.

Example 3. Callahan in New York wishes to pay a debt to House in London. (1) If Callahan has a debtor, Vinton, in London, he may draw a bill of exchange on Vinton payable to House or order and send it to House, who can present it to Vinton and obtain payment. (2) Callahan may buy in New York a bill of exchange drawn by Junkett in New York on his debtor, Wickens, in London, payable say to Gordon's order. Gordon sells and indorses it to Callahan, and Callahan indorses it to House and sends it to House, who presents it to Wickens and obtains payment. (3) Callahan may buy at a New York bank a bill of exchange drawn by that bank on a London bank, payable to House or his order; Callahan sends it to House, who presents it at the London bank and receives payment. By these methods payments are made between New York and London without transferring money. In the end some big banking concern in one place may export gold to the other place to settle balances.

A check is a special kind of bill of exchange, being a bill drawn by a depositor on his bank, payable on demand. A bill of exchange drawn by one bank on another is often called a draft. It is simply a check and is more properly called a cashier's check.

Promissory notes were once held by the English courts not to be negotiable instruments, but in 1704 Parliament passed an act providing that they should be negotiable the same as bills of ex-

change, and such is the law in this country. When these are issued by banks, we call them bank notes. A certificate of deposit is another form of promissory note issued by a bank to one who deposits money and takes the note of the bank for it. Corporations and governments issue long-time promises-to-pay in the form of bonds, which in the case of private corporations are usually secured by a mortgage on the property of the corporation.

Bills of lading at common law and warehouse receipts by statute are given a limited negotiable character, but these do not fall within the generally accepted category of negotiable instruments. By the Federal Bills of Lading Act and by the Uniform Bills of Lading Act order and bearer bills of lading are rendered fully negotiable. By the Uniform Warehouse Receipts Law (except in Alabama, California, Colorado, and Vermont) and the Uniform Sales Act, warehouse receipts and other documents of title running to order or bearer are given a limited negotiability but are not negotiable in the hands of a thief or finder. Stock certificates have also a limited negotiable standing. Bills of lading and warehouse receipts are promises to deliver goods, and stock certificates are evidence of an interest in a business enterprise, while negotiable instruments have to do with unconditional promises or orders to pay money. The three instruments here described resemble negotiable instruments mainly in that they are transferred from hand to hand by indorsement, but they are not, like negotiable instruments, a kind of substitute for money. They are paper evidence of some property right.

110. Characteristics of negotiable instruments. There are three characteristics that serve to distinguish negotiable instruments from ordinary contracts.

1. *Presumptive consideration.* If a contract is in the form of a negotiable instrument, there is a presumption that it was given for a consideration, whereas in an ordinary contract one who brings an action upon it must prove that the promise he is seeking to enforce rests upon a consideration.

Example 1. (1) "On April 1 next, I promise to pay to the order of Johannes Bowers one hundred dollars. CHRISTIAN VOGEL." (2) "On April 1 next, I promise to deliver to the order of Johannes Bowers one hundred bushels of wheat. CHRISTIAN VOGEL." In the first example Bowers in an action against Vogel need not prove any consideration; it is for Vogel to prove that there was none, if he can do so. In the second example Bowers in an action against Vogel must prove the consideration for the promise to deliver the wheat, and if he fails to do so he will be defeated in his action.

2. *Days of grace.* Unless abolished by statute, three days of grace beyond the time fixed are allowed for the payment of negotiable instruments, whereas in ordinary contracts no days of grace are allowed. In the examples given above, Johannes Bowers could not demand payment of the money until April 4, while he could demand delivery of the wheat on April 1. Days of grace have been very generally abolished by statute. They were established when means of communication between distant places were uncertain and slow; with the introduction of steam transportation the need for them disappeared.[1]

3. *Negotiability.* Negotiability is the important characteristic of these instruments. As we have seen (sect. 36), ordinary contracts are often assignable, but the assignee cannot sue in his own name except by force of statute, and when he sues he is subject to all the defenses that might have been set up against his assignor. Bills, notes, and checks, however, are negotiable, not merely assignable. Negotiability carries with it the following results: (1) the transferee gets a legal title and can sue in his own name; (2) if the transferee is a holder for value and without notice of defenses and obtains title before the instrument is due, he is free from the defenses that might have been set up against his transferor, except those that operate to destroy the contract altogether. He is not subject to the personal defenses of fraud, duress, want of consideration, want of title in the transferor, and the like, but is subject to the absolute defenses of forgery, alteration, infancy of maker, that the statute declares the instrument void (as it does a gambling contract), etc. It is this element of negotiability that makes it necessary to treat these contracts separately.

Example 2. (1) In Example 1, given above, assume that Johannes Bowers indorses and delivers the note to Bradley Wilhite on March 15, and that Wilhite sues the maker, Christian Vogel. If Wilhite paid value and had no notice of any defect in Bowers's title, Vogel cannot defend on the ground that Bowers procured the note by fraud or without consideration; but the defense that Vogel's name is forged, or that the note has been

[1] In Massachusetts, New Hampshire, and Rhode Island days of grace are still allowed in the case of bills payable on sight, unless there is an express provision to the contrary. In North Carolina days of grace are allowed only on bills of exchange payable at sight, if the instrument expressly provides for them.

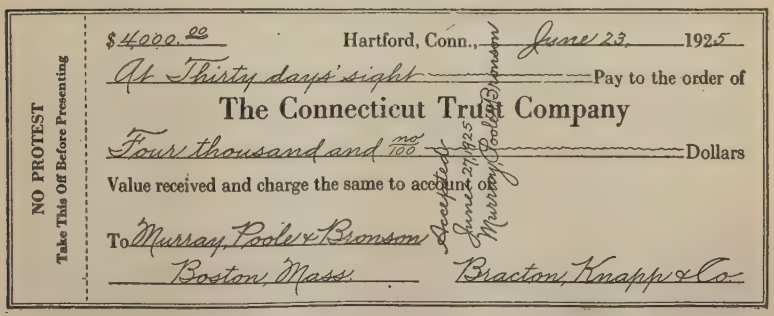
altered, would be a good defense. (2) In Example 1 assume that Bowers indorses and delivers to Wilhite the promise to deliver the wheat, and that Wilhite pays value and has no notice of any defect. If Wilhite sues Vogel, any defense that would be good against Bowers is still good against Wilhite. This is an assignment, and an assignee stands in his assignor's shoes.

111. Definitions. The various negotiable instruments are named and defined as follows:

1. *Bill of exchange.* A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it (called the drawer), requiring the person to whom it is addressed (called the drawee) to pay on demand or at a fixed future time or at a time capable of being fixed, a certain sum in money to the order of a named person (called the payee) or to bearer.

The person upon whom the bill is drawn, that is, the drawee, may be asked to give his assent to honor the bill, and if he does so, he becomes an acceptor. This assent is usually given by writing his name with the word "Accepted" across the face of the bill. When a bank so gives its assent to honor a check, the check is said to be certified.

If not payable to order or bearer, the bill would be nonnegotiable.



BILL OF EXCHANGE WITH ACCEPTANCE

The above bill was accepted June 27, 1925. It was due thirty days from sight, and hence became due thirty days from June 27, or on July 26, 1925. It could be transferred by an indorsement on the back by The Connecticut Trust Company, the payee

A foreign bill of exchange is often drawn in a set of two or three duplicate parts, each part numbered and referring to the others. The parts are used to avoid the chance of loss of the bills in the mails or to save time in securing an acceptance.

Exchange for Chicago, June 16, 1925

Ninety days after sight of this **First**
of Exchange (Second of same tenor and date unpaid)
Pay to the order of Bancroft, Whitman & Co.
One thousand pounds sterling
Value received and charge the same to account of
To The London Bank Ltd.
London, England
No. 362

Early National Bank of Chicago
by Edw. Tompkins, Cashier

Exchange for Chicago, June 16, 1925

Ninety days after sight of this **Second**
of Exchange (First of same tenor and date unpaid)
Pay to the order of Bancroft, Whitman & Co.
One thousand pounds sterling
Value received and charge the same to account of
To The London Bank Ltd.
London, England
No.

Early National Bank of Chicago
by Edw. Tompkins, Cashier

BILLS IN A SET

If there were three parts, the first would read, "second and third of same tenor and date, unpaid," and the second would read, "first and third of same tenor and date, unpaid," and the third would read, "first and second of same tenor and date, unpaid"

a. Suppose Bancroft, Whitman & Co. buy the exchange set forth below in New York in order to pay a debt to Janson Brothers in Calcutta, India. Were it payable at sight or at a fixed future time, they would indorse each part to Janson Brothers and send one part by one steamer and another by a second steamer in order to avoid danger of loss or delay.

b. As it is payable after sight, if it is all sent to Calcutta and from there to London, it would be weeks before any part could be presented for acceptance, and it would then run ninety days after such presentation. But if one part is sent direct to London for acceptance, the final due date will be hastened and the present value of the bill increased. Therefore one part is sent to London indorsed, "At the disposal of the second or third, duly indorsed." The second and third will then be indorsed to Janson Brothers and sent to Calcutta by different mails, with the information that the first has gone direct to London for acceptance. Janson Brothers in Calcutta can then deal with the bill, assuming that it would be accepted about June 26 and would become due ninety days thereafter. They will send parts two and three to London in time to have them there when the bill becomes due, or they will sell them in Calcutta and the buyer will send them to London.

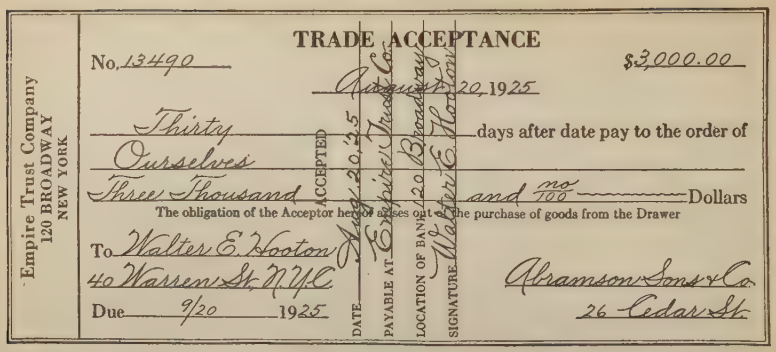
The drawee should accept but one part; for if he accepts two, each might be indorsed to a different holder, and the acceptor would be liable on each. A holder should not indorse parts to different persons, or he will be twice liable. When the bill is paid, the acceptor should take up the part he has accepted.

2. *Trade acceptance.* A trade acceptance is a bill of exchange drawn by a seller of goods upon the buyer, and accepted by the buyer.

Example. Abramson Sons & Co. sell Hooton $3000 worth of cloth on thirty days' credit. With the invoice for the goods they send to the buyer a trade acceptance, in the form indicated below. The buyer writes his acceptance across the face of the instrument. The seller may then indorse and discount the acceptance and get his money out of the transaction at once, instead of having his money tied up in a book account.

To make the trade acceptance available for discount with Federal Reserve Banks it is necessary, under the rules of those banks, to have the following clause on the acceptance: "The obligation of the acceptor hereof arises out of the purchase of goods from the drawer."

A "banker's acceptance" is a bill of exchange drawn on and accepted by a banker or banking institution, whereby the bank lends its credit to the drawer for a consideration.



TRADE ACCEPTANCE

No. 13490 $3,000.00

August 20, 1925

Thirty days after date pay to the order of

Ourselves

Three Thousand and no/100 Dollars

The obligation of the Acceptor hereof arises out of the purchase of goods from the Drawer

To Walter E. Hooton
40 Warren St. N.Y.C.

Due 9/20 1925

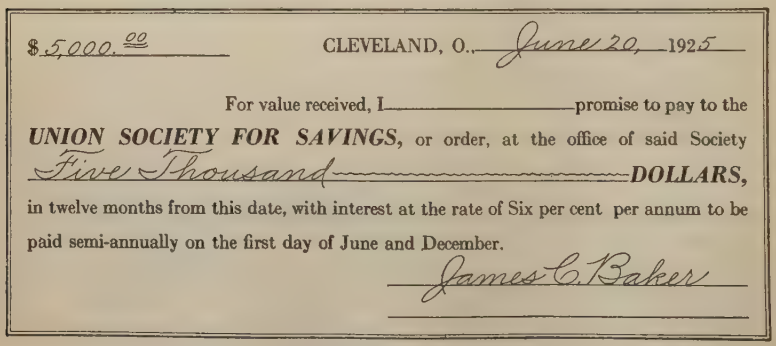
Abramson Sons & Co
26 Cedar St.

Empire Trust Company
120 BROADWAY
NEW YORK

ACCEPTED Aug. 20, 25
PAYABLE AT Empire Trust Co
LOCATION OF BANK 120 Broadway
SIGNATURE Walter E. Hooton

TRADE ACCEPTANCE

3. *Promissory note.* A promissory note is an unconditional promise in writing made by one person (called the maker) and signed by him, promising to pay on demand, or at a fixed future time, or at a time capable of being fixed, a certain sum in money to the order of another person (called the payee) or to bearer.



$5,000.00 CLEVELAND, O., June 20, 1925

For value received, I promise to pay to the

UNION SOCIETY FOR SAVINGS, or order, at the office of said Society

Five Thousand **DOLLARS,**

in twelve months from this date, with interest at the rate of Six per cent per annum to be paid semi-annually on the first day of June and December.

James C. Baker

PROMISSORY NOTE

If not payable to order or bearer, the note would be non-negotiable.

It is not necessary to state the place where the note is payable, but this is usually done in commercial paper in order to make easy presentment for payment. This note may be indorsed on the back by the Society for Savings. The words "with interest" may be written in after the words "value received" if the note is to draw interest. The above note may be dis-

counted, say at the bank where payable; that is, the payee may indorse and sell it to the bank for its present value. How much is $2500, payable in three months, worth in a state where the interest rate is 6 per cent?

4. *Certificate of deposit.* A certificate of deposit is in effect a promissory note given by a bank to a depositor, acknowledging the

NOT SUBJECT TO CHECK
This certificate does not draw interest after maturity

CALIFORNIA TRUST & SAVINGS BANK

LOS ANGELES April 6, 1925 No. 36427

Paul M. Piper Has

Deposited in this Bank, subject to its by-laws $300.00

Three hundred DOLLARS

Payable six Months after date, to the order of

Paul M. Piper on return of this certificate properly endorsed,

with interest at the rate of four per cent per Annum.

Cassius C. Phillips
Cashier

CERTIFICATE OF DEPOSIT

receipt of the deposit and promising to pay it to the order of the depositor. It may be made payable on demand or it may be made payable at a fixed future time with interest. If one has a special fund which he wishes to put into a bank but against which he does not wish to draw checks, he ordinarily takes a certificate of deposit.

CONNECTICUT

No. 3148 HARTFORD, CONN. August 20, 1925

THE CONNECTICUT TRUST COMPANY

PAY TO McDonald, Smith & Bro. OR BEARER

Fourteen hundred sixty and 12/100 DOLLARS

$1460.12

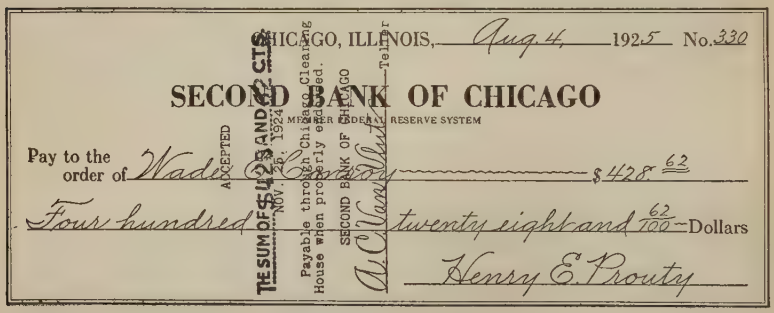
Granville E. Gordon

CHECK

5. *Check.* A check is a bill of exchange drawn on a bank and payable on demand. If payable at a future time, it would be an

ordinary bill of exchange. When one deposits money in a bank, he receives a bank book with the amount he has deposited entered in it. He can then draw checks against this deposit. The checks are not entered in the bank book. They are returned to the depositor from time to time when the account is balanced. If a payee wishes to be sure that the check is good, he can present the check to the drawee bank for certification or ask the drawer to have it certified. When the check is certified, the bank becomes liable to the payee, and it charges the certified check against the depositor's account as a check which it has actually paid.

The words "Accepted," "Certified," "Good" are all used to indicate that the bank has honored the check.


CHICAGO, ILLINOIS, Aug. 4, 1925 No. 330

SECOND BANK OF CHICAGO

MEMBER FEDERAL RESERVE SYSTEM

Pay to the order of Wade & Conroy $428.62

Four hundred twenty eight and 62/100 Dollars

Henry E. Prouty

ACCEPTED NOV. 26, 1924

THE SUM OF $428.62 AND 62 CTS

Payable through Chicago Clearing House when properly endorsed.

SECOND BANK OF CHICAGO

A. Clark Teller

CERTIFIED CHECK

6. *Bank draft or check.* A bank's check, often called a draft, is a check drawn by one bank upon another bank and payable on demand. If payable at a future time, it is a bill of exchange but not a check. One bank often keeps deposits in another bank in order to be able to furnish these bank drafts or bills. A country bank will need to be able to furnish New York or Chicago exchange, and even a New York or Chicago bank, if not a member of the clearing house, will need to be able to furnish drafts or checks upon a New York or Chicago bank that is a member of the clearing house. So a large bank may keep accounts with a London bank in order to issue its checks or bills on London and furnish London exchange.

These drafts or banker's checks are usually drawn without being countersigned by the president or other official, but some banks require countersigning by the president or cashier out of extra caution. Drafts may be drawn a given number of days after sight or after date.

In the example of a bill in sets, given above, we have a banker's bill of exchange. It is drawn by a Chicago bank on a London bank and is payable ninety days after sight, that is, ninety days after it is first presented at the London bank. This is called London exchange; it is a bill of exchange drawn on a bank in London.

The Amalgamated Trust Company
MAIN OFFICE No. 33427

CLEVELAND, OHIO August 12, 1925

PAY TO THE ORDER OF $3,000.00

William Waldo Washburn

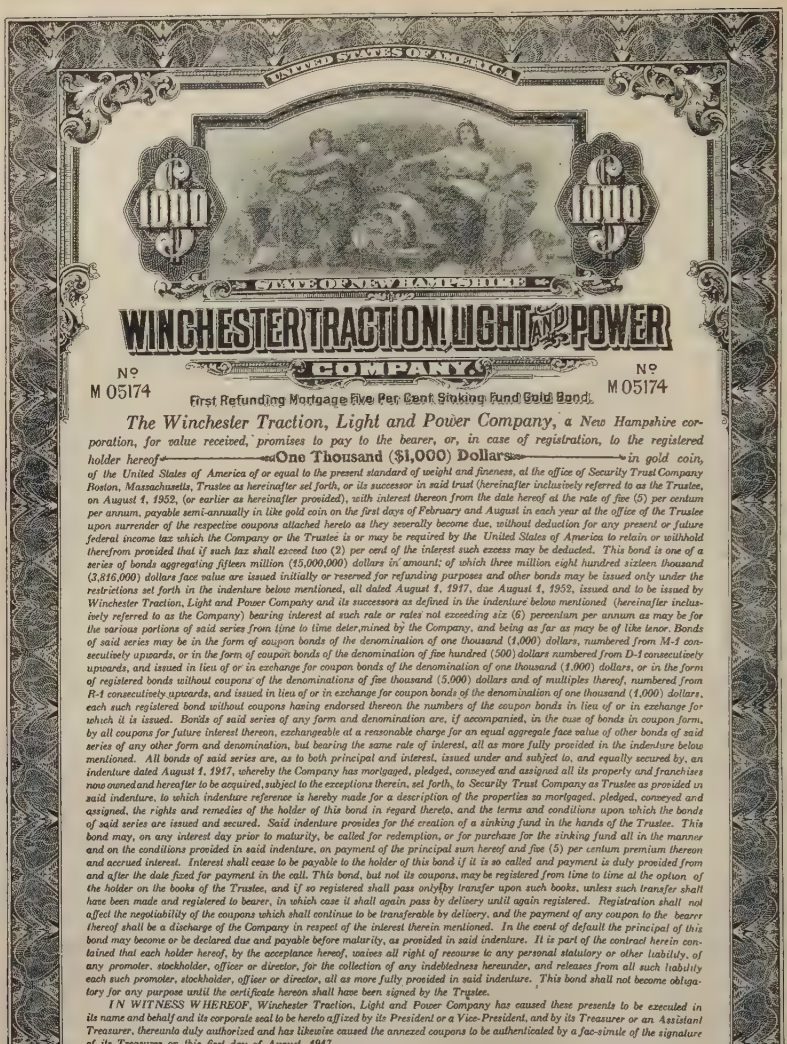
Three thousand and no/100 dollars

TO
THE SMITH NATIONAL BANK
NEW YORK

L. Joel Carnegie
ASS'T VICE PRES.

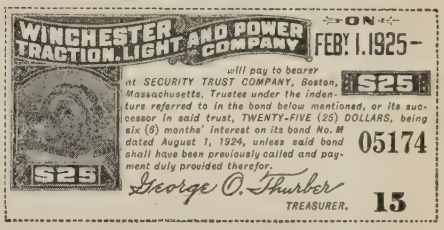
BANK DRAFT OR CHECK

7. *Bonds.* A negotiable bond is in effect a promissory note under seal issued by a corporation, government, or governmental political division like a city or county. At common law a negotiable instrument could not be under seal; if an instrument otherwise negotiable was duly sealed, it thereby ceased to be negotiable. But by custom recognized by courts these instruments issued by corporations and governments under the corporate or governmental seal came to be regarded as negotiable. But not all bonds are negotiable. Bonds are either coupon bonds or registered bonds. The latter are bonds payable to a specified person whose name is registered in the books of the corporation or government, and they are transferable only by registering the name of the transferee. Coupon bonds are bonds payable to a person, or order, or bearer, and have attached to them coupon notes for each installment of interest as it falls due. These coupons are cut off and presented


UNITED STATES OF AMERICA
1000
1000
STATE OF NEW HAMPSHIRE
WINCHESTER TRACTION, LIGHT AND POWER
COMPANY
No M 05174
No M 05174
First Refunding Mortgage Five Per Cent Sinking Fund Gold Bond.
The Winchester Traction, Light and Power Company, a New Hampshire corporation, for value received, promises to pay to the bearer, or, in case of registration, to the registered holder hereof One Thousand ($1,000) Dollars in gold coin, of the United States of America of or equal to the present standard of weight and fineness, at the office of Security Trust Company Boston, Massachusetts, Trustee as hereinafter set forth, or its successor in said trust (hereinafter inclusively referred to as the Trustee, on August 1, 1952, (or earlier as hereinafter provided), with interest thereon from the date hereof at the rate of five (5) per centum per annum, payable semi-annually in like gold coin on the first days of February and August in each year at the office of the Trustee upon surrender of the respective coupons attached hereto as they severally become due, without deduction for any present or future federal income tax which the Company or the Trustee is or may be required by the United States of America to retain or withhold therefrom provided that if such tax shall exceed two (2) per cent of the interest such excess may be deducted. This bond is one of a series of bonds aggregating fifteen million (15,000,000) dollars in amount, of which three million eight hundred sixteen thousand (3,816,000) dollars face value are issued initially or reserved for refunding purposes and other bonds may be issued only under the restrictions set forth in the indenture below mentioned, all dated August 1, 1917, due August 1, 1952, issued and to be issued by Winchester Traction, Light and Power Company and its successors as defined in the indenture below mentioned (hereinafter inclusively referred to as the Company) bearing interest at such rate or rates not exceeding six (6) percentum per annum as may be for the various portions of said series from time to time determined by the Company, and being as far as may be of like tenor. Bonds of said series may be in the form of coupon bonds of the denomination of one thousand (1,000) dollars, numbered from M-1 consecutively upwards, or in the form of coupon bonds of the denomination of five hundred (500) dollars numbered from D-1 consecutively upwards, and issued in lieu of or in exchange for coupon bonds of the denomination of one thousand (1,000) dollars, or in the form of registered bonds without coupons of the denominations of five thousand (5,000) dollars and of multiples thereof, numbered from R-1 consecutively upwards, and issued in lieu of or in exchange for coupon bonds of the denomination of one thousand (1,000) dollars, each such registered bond without coupons having endorsed thereon the numbers of the coupon bonds in lieu of or in exchange for which it is issued. Bonds of said series of any form and denomination are, if accompanied, in the case of bonds in coupon form, by all coupons for future interest thereon, exchangeable at a reasonable charge for an equal aggregate face value of other bonds of said series of any other form and denomination, but bearing the same rate of interest, all as more fully provided in the indenture below mentioned. All bonds of said series are, as to both principal and interest, issued under and subject to, and equally secured by, an indenture dated August 1, 1917, whereby the Company has mortgaged, pledged, conveyed and assigned all its property and franchises now owned and hereafter to be acquired, subject to the exceptions therein, set forth, to Security Trust Company as Trustee as provided in said indenture, to which indenture reference is hereby made for a description of the properties so mortgaged, pledged, conveyed and assigned, the rights and remedies of the holder of this bond in regard thereto, and the terms and conditions upon which the bonds of said series are issued and secured. Said indenture provides for the creation of a sinking fund in the hands of the Trustee. This bond may, on any interest day prior to maturity, be called for redemption, or for purchase for the sinking fund all in the manner and on the conditions provided in said indenture, on payment of the principal sum hereof and five (5) per centum premium thereon and accrued interest. Interest shall cease to be payable to the holder of this bond if it is so called and payment is duly provided from and after the date fixed for payment in the call. This bond, but not its coupons, may be registered from time to time at the option of the holder on the books of the Trustee, and if so registered shall pass only by transfer upon such books, unless such transfer shall have been made and registered to bearer, in which case it shall again pass by delivery until again registered. Registration shall not affect the negotiability of the coupons which shall continue to be transferable by delivery, and the payment of any coupon to the bearer thereof shall be a discharge of the Company in respect of the interest therein mentioned. In the event of default the principal of this bond may become or be declared due and payable before maturity, as provided in said indenture. It is part of the contract herein contained that each holder hereof, by the acceptance hereof, waives all right of recourse to any personal statutory or other liability, of any promoter, stockholder, officer or director, for the collection of any indebtedness hereunder, and releases from all such liability each such promoter, stockholder, officer or director, all as more fully provided in said indenture. This bond shall not become obligatory for any purpose until the certificate hereon shall have been signed by the Trustee.
IN WITNESS WHEREOF, Winchester Traction, Light and Power Company has caused these presents to be executed in its name and behalf and its corporate seal to be hereto affixed by its President or a Vice-President, and by its Treasurer or an Assistant Treasurer, thereunto duly authorized and has likewise caused the annexed coupons to be authenticated by a fac-simile of the signature of its Treasurer on this first day of August, 1917.
WINCHESTER TRACTION, LIGHT AND POWER COMPANY,
By
And by
Horace F. Barnes
ASSISTANT TREASURER
James R. Goodwin
PRESIDENT

BOND OF A CORPORATION

for payment of interest, or they may be cut before they are due and negotiated like a promissory note. The negotiable bond is usually a coupon bond payable to bearer. A bond is a quite formal instrument containing not only the negotiable promise but also provisions concerning the particular issue of bonds of which it is one, and the mortgage security therefor. Since a mortgage cannot well be made to each bondholder, it is made to a trustee or trustees for the benefit of all the bondholders. The bond is signed by the proper officials and usually bears the corporate or governmental seal. But these instruments are sometimes issued without a seal, and although, when so issued, they are not technically bonds, they are nevertheless in business usage called bonds.


WINCHESTER TRACTION, LIGHT AND POWER COMPANY
ON FEB'Y 1, 1925
will pay to bearer
at SECURITY TRUST COMPANY, Boston, Massachusetts, Trustee under the indenture referred to in the bond below mentioned, or its successor in said trust, TWENTY-FIVE (25) DOLLARS, being six (6) months' interest on its bond No. M dated August 1, 1924, unless said bond shall have been previously called and payment duly provided therefor.
$25
$25
05174
George O. Thurber
TREASURER.
15

112. Negotiable Instruments Law. The law of negotiable instruments has been stated in a code, and a uniform act has been passed in all the states.[1] This Negotiable Instruments Law will be followed in this chapter. It supersedes the common, or unwritten, law of negotiable instruments.

This law is based on a similar code in England known as the Bills of Exchange Act. This English act is also in force in most of the English colonies.

II. Form

113. What a negotiable instrument must contain. An instrument, to be negotiable (and not merely a common-law contract), must conform to the following requirements.

1. It must be in writing and signed by the maker or drawer. A writing includes printing, and the writing may be in pencil.

Examples. 1. One may sign in a trade or assumed name. Even the indorsement by figures 1, 2, 8 has been held sufficient.

[1] The act is not adopted in Porto Rico.

2. Only the person who signs is liable. The signature "James Grayson, agent," or "John Sykes, treasurer," binds only James Grayson or John Sykes, and not his principal, for these are mere terms of description. The signature should be "Otto Kruse, by James Grayson, agent," or "J. O'Bannion Co., by James Grayson, treasurer." By the custom of banks the signature "Cecil Curran, cashier," binds the bank whose name appears on the instrument.

3. A forged signature does not bind the one whose name is forged. No rights can be acquired by any holder under a forged signature.

2. It must contain an unconditional promise or order to pay a sum certain in money. A promissory note contains a promise. A bill of exchange, or check, contains an order. The point is that these must be without conditions attached to them.

Examples. 4. "I O U twenty dollars" is not a promise but a mere acknowledgment. So also, "Due you twenty dollars."

5. "Be so kind as to let the bearer have twenty dollars" may, perhaps, be too civil to be regarded as an order.

6. "I promise to pay to order of Percy Hodge twenty dollars out of proceeds of Hillview Farm" is conditional and therefore nonnegotiable. There may not be proceeds from that farm sufficient to pay.

7. "Pay to order of Percy Hodge twenty dollars and charge to account of Hillview Farm" is unconditional, because it merely indicates the fund from which the payer is to get back his money.

8. "Pay to the order of Percy Hodge all the proceeds of Hillview Farm" is nonnegotiable because the sum is uncertain. But the law permits payment "with exchange" or with "costs of collection or attorney's fees in case not paid at maturity," although these may render the sum uncertain. It also allows payment by installments, with a provision that upon default in the payment of any installment the whole sum shall become due.

9. "Deliver to order of Jason Gleeson 100 bushels of wheat" is nonnegotiable because not payable in money.

10. The instrument may provide for a particular kind of money, as gold coin, silver dollars, greenbacks, or a foreign money, as Mexican silver dollars. There has been much conflict as to whether instruments payable in "current funds" are negotiable, since current funds may include the promissory notes of banks (that is, bank notes), which are themselves merely negotiable instruments. If payable in any kind of legal-tender money, there could be no question; but current funds include more than legal-tender money, and courts have differed as to whether that phrase is the equivalent of money.

3. The promissory note must be payable on demand, or at a fixed future time, or at a time capable of being fixed.

Examples. 11. "On demand, pay etc.," "At sight, pay etc.," are payable on demand. So also if no time for payment is expressed, the instrument is payable on demand. Such instruments are due at once and become overdue after the expiration of a reasonable time.

12. "Thirty days after date," "On or before Jan. 1, 1925," "Within one year after my death,"—these are all fixed or determinable dates. "When Jules Colvin is twenty-one" is not, because Jules may never reach that age. "Thirty days after sight, etc." is determinable.

4. The promissory note must be payable to order or to bearer.

Examples. 13. "I promise to pay Michael Kelly twenty dollars" is nonnegotiable.

14. "I promise to pay Michael Kelly or order twenty dollars" is negotiable.

15. "I promise to pay the bearer twenty dollars" is negotiable.

16. "I promise to pay cash twenty dollars" is payable to bearer.

17. If the payee is known by the maker to be an imaginary person, the instrument is payable to bearer.

18. When an instrument payable to the order of Michael Kelly is indorsed in blank by Michael Kelly, it is then payable to bearer. An indorsement is in blank when Michael Kelly simply writes his name upon the back of the instrument.

19. An instrument may be made payable to the order of the maker, or drawer, or drawee, or two or more persons jointly.

5. If the instrument is a bill of exchange, it must name or otherwise indicate the drawee with reasonable certainty.

Examples. 20. "To ——, Mobile, Alabama," is not a bill, because the drawee is neither named nor indicated.

21. "To the owner of the steamer *Dorrance*" is sufficient, because the drawee is indicated, though not named.

114. What a negotiable instrument must not contain. The rule and the exceptions upon this point may be stated as follows:

1. *Rule.* Subject to the exceptions enumerated below, a negotiable instrument must not contain a promise or an order to do any act in addition to the payment of money.

Examples. 1. "I promise to pay to the order of Wilson Deming fifty dollars and also deliver to his order 100 bushels of wheat" is nonnegotiable.

2. "Pay to Wilson Deming or order fifty dollars and also deliver to him my horse Billy B." is nonnegotiable.

2. *Exceptions.* The exceptions to this rule are given below.

a. The instrument may give the *holder* a choice of requiring something to be done in place of the payment of money. In such case the maker promises the payment of money and has no opportunity to do anything else. The holder may require the payment of the money, but he may if he chooses take something in place of it.

Example 3. "I promise to pay to the order of Bleecker Marquette fifty dollars or at his choice deliver to him 100 bushels of wheat" is negotiable.

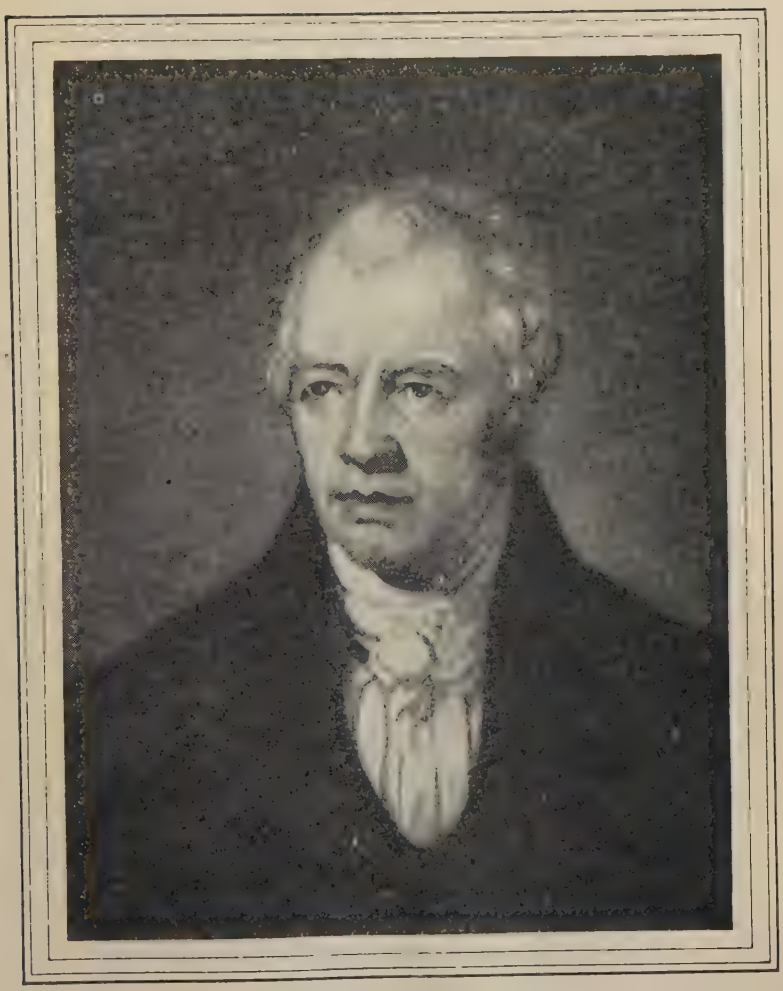
b. The instrument may authorize the sale of property held as security in case of nonpayment when due. The note given to a bank that lends money on security usually contains a provision for the sale of the securities in case of default in payment.

c. The instrument may provide that the maker will allow judgment to be taken against him if the instrument is not paid when due. Judgment notes are not used in some states, but where they are in use the Negotiable Instruments Law regards them as negotiable.

d. The instrument may waive the benefit of any law intended for the advantage or protection of the maker unless such waiver is forbidden by the statute creating the exemption. In some states it is allowable to insert in a negotiable instrument a clause waiving the benefits of laws allowing a debtor to hold a homestead and a small amount of furniture, tools, etc. free from claims of creditors.

115. Nonessentials. There are certain things which may or may not appear in a negotiable instrument, and their presence or absence will not affect its negotiability.

1. *Statement of consideration.* A negotiable instrument need not state that any value was given. It is usual to insert the words "for value received," but this is not necessary to its validity, and the instrument is presumed to have a consideration without the use of these or equivalent words. In some states there are special statutes requiring that the consideration shall be stated in negoti-



JAMES KENT (1763–1847)

A lawyer who became Chief Justice of the New York Supreme Court and Chancellor of the State. He was the first lecturer in law at Columbia University. His "Commentaries on American Law" had a great effect on the development of American jurisprudence and were long a favorite text for law students

able instruments given in payment for patent rights, and these statutes must be observed. An instrument is not rendered non-negotiable merely because it states the consideration, as, for instance, if it reads, "In payment for one horse I promise to pay etc."

2. *Date.* A negotiable instrument need not be dated. If it is issued undated, the true date, which is the date when issued, may be inserted by any holder. The insertion of a wrong date binds prior parties in favor of a holder who afterward takes the instrument for value and without notice of the error. It is always best to date a negotiable instrument, in order to avoid difficulties.

3. *Place.* A negotiable instrument need not state the place where it is drawn or the place where it is payable. It is, of course, best to insert the place and the date, but these are not essentials.

116. Effect of blanks. If an instrument is issued with blank spaces in it, a person who takes it has notice that it is to be filled up, and is put upon inquiry as to how it is to be filled. Any holder may fill the blanks in accordance with the authority given by the maker; if he fills them contrary to the directions of the maker, he cannot recover upon the instrument. But if he fills them contrary to the directions of the maker and then transfers the completed instrument to a holder for value and without notice, the parties who signed or indorsed the instrument before such holder are liable to him. It is better that one who puts out an incomplete instrument should suffer loss than that the innocent purchaser should suffer it. A space which the writing does not completely fill, as the space for the amount, is not a blank if there is some writing in the space.

Examples. 1. Watts indorses Thornton's notes with the amount left blank, and authorizes Thornton to fill up the blank for an amount necessary to renew another note then due; this amount is in fact $240. Thornton fills up the note for $1000 and discounts it at a bank which knows nothing of these facts. Watts is liable to the bank as indorser for $1000.

2. Straus draws and delivers to Lanning a check with the amount left blank, and authorizes Lanning to write in an amount not exceeding $100. Lanning writes in $500 and the bank pays the check. Straus must suffer the loss.

3. Ward draws and delivers to Buckley a check for $2 upon a printed form thus: "two _____ Dollars." Buckley writes in the

word "hundred" and changes the figures to correspond: "Two hundred _____ Dollars." The bank pays Buckley $200. This is an alteration, not filling a blank. The loss is that of the bank, although some states say that Ward may be estopped to set up the alteration if he has by his negligent manner of drawing the check "invited" alterations. The general rule is that the alteration destroys the instrument, but the Negotiable Instruments Law allows a holder in due course to recover upon it for the original amount, and under this law the bank could charge Ward's account with $2.

117. Delivery. Ordinarily a negotiable instrument must be delivered in order to be valid. As between immediate parties, such as maker and payee, indorser and indorsee, this rule is absolute; but as between a prior party, as a maker, and a later purchaser for value without notice, a valid delivery by the maker to the payee is conclusively presumed if the instrument was completed by the maker, but not if it was incomplete.

Examples. 1. Duer makes a promissory note payable to the order of McComb and leaves it on his desk. McComb takes possession of it without Duer's consent. McComb cannot recover against Duer, because there was no delivery.

2. In the above case McComb indorses the note and transfers it to Rosenfield, who is a holder in due course. Rosenfield may recover against Duer. The case would be the same if Duer locked the instrument in his desk or safe and McComb broke in and took it. It is especially dangerous to keep undelivered completed instruments payable to bearer, because any thief, by getting possession of such an instrument, could give good title to it.

3. If in the above case the instrument was incomplete in some respect (for example, if it was not filled in as to amount), and it was stolen, completed by filling blanks, and negotiated, the maker would not be liable.

III. NEGOTIATION

118. Negotiation; indorsement; delivery. Negotiation may be by indorsement and delivery, or by delivery alone, according as the instrument does or does not require an indorsement.

1. *Negotiation.* An instrument is negotiated when it is transferred from one person to another in such manner as to make the transferee the holder thereof. If payable to bearer, or if the last indorsement is in blank, it may be negotiated by delivery, the same as money. If payable to order, it is negotiated by the in-

dorsement of the holder, followed by delivery. If the body of the instrument is in terms to make it negotiable, this negotiability cannot be taken away by the mere failure to repeat in the indorsement the words of negotiability. Indorsements are written on the back of the instrument. If that is filled, another strip, called an "allonge," is attached, and the indorsements are continued upon that.

2. *Indorsement.* Indorsements may be either special or in blank, and may be unqualified or qualified or restrictive.

a. A special indorsement names the indorsee, as "Pay to Julian Stanford. O. B. Getz." This could not again be negotiated without Stanford's indorsement.

b. A blank indorsement names no indorsee. The indorser simply writes his name on the back of the instrument, and it then becomes payable to bearer. Any holder may, however, convert this into a special indorsement by writing "Pay to (his name)" over the blank indorsement.

c. An unqualified or restricted indorsement places no restriction upon the further negotiation of the instrument or upon the indorser's liability. The indorsements given above are unqualified and unrestricted.

d. A qualified indorsement simply passes title without rendering the indorser liable upon the paper. The form used for this purpose is "without recourse," written above the indorser's name. This does not impair the negotiability of the paper; it simply relieves this indorser from liability upon it.

e. A restrictive indorsement constitutes the indorsee an agent of the indorser, usually for the collection of the paper. The form commonly used is "Pay to First National Bank for collection. Elias Bronner." Other forms are: "Pay to First National Bank only. Elias Bronner"; "Pay to the First National Bank for deposit only." This indorsement is notice that Elias Bronner owns the paper, and practically prohibits further negotiation except for collection purposes. The indorsee may receive payment or may transfer to another person who is to receive payment, but there cannot subsequently be a holder in due course free from the claims of Elias Bronner.

The indorser may waive presentment, notice, and protest by so stating above his indorsement. The phrase "waiving protest" is ordinarily used for this purpose. This waives the conditions in his contract (see section 125).

A transfer of paper payable to order without indorsement is a mere assignment and not a negotiation. The transferee is entitled, however, to have the indorsement of the transferor, and negotiation takes effect from the time he secures such indorsement.

The last transferee or indorsee is one kind of holder. He may be a "holder in due course" or "not a holder in due course," and his rights may depend upon his position in this respect.

EXAMPLES OF INDORSEMENTS

[Refer to the promissory note on page 192]

Blank indorsement:
UNION SOCIETY FOR SAVINGS

Special indorsement:
Pay to the order of JOHN SPEARING
UNION SOCIETY FOR SAVINGS

Qualified indorsement:
Without recourse
UNION SOCIETY FOR SAVINGS
or
Pay to JOHN SPEARING, without recourse
UNION SOCIETY FOR SAVINGS

Restrictive indorsement:
Pay to JOHN SPEARING for collection
UNION SOCIETY FOR SAVINGS

Waiving conditions:
Waiving protest
UNION SOCIETY FOR SAVINGS
or
Pay to JOHN SPEARING, waiving protest
UNION SOCIETY FOR SAVINGS

The indorsee may indorse to another and he to another, and so on.

Successive indorsements:
Pay to JOHN SPEARING
UNION SOCIETY FOR SAVINGS

Pay to RALPH LEAR
JOHN SPEARING

Pay to GOLDBERG & MORTON
RALPH LEAR

119. Holder in due course. A holder in due course is a holder who takes completed and regular paper before it is due in good faith and for value, and without notice of any defects or defenses. He is often called a "*bona fide* holder for value without notice." The phrase "holder in due course" is used in the Negotiable Instruments Law. In order to be a holder in due course a transferee must take the instrument under the following conditions.

1. The instrument must be complete and regular upon its face.

Any blank, any erasure, any irregularity, indicates that the paper is not issued in the usual course of business, is not in conformity with business customs, and the holder is warned by this fact. As to what appears upon the face of the paper, the rule is *caveat emptor* (let the buyer beware).

2. The instrument must not be overdue.

When the instrument is payable at a fixed time, its due date is certain. A transfer on the day of maturity is before the instrument is overdue.

When an instrument is payable on demand, it is due a reasonable time after its issue. What is a reasonable time is a question of fact to be decided by the nature of the instrument, the customs of trade, and the facts of the particular case. Some cases have held three months to be too long; some states by statute specify what is to be regarded as a reasonable time in the case of paper payable on demand. The due date of a promissory note payable on demand is not affected by negotiations of the note, but a bill of exchange payable on demand, if negotiated at reasonable intervals, is due within a reasonable time after the last negotiation.

3. The holder must take the instrument in good faith and for value.

Bad faith may be gathered from circumstances, as where an instrument to which the maker has a good personal defense is transferred for a sum so small in proportion to its face value as to raise a suspicion of bad faith. Such grossly inadequate consideration may be evidence of bad faith and is to be considered in deciding that question of fact. If an officer of a corporation, authorized to draw checks of the corporation, wrongfully makes a corporation check to himself, a bank receiving this check is charged with

notice of the wrongdoing because of the suspicious character of the transaction. Banks protect themselves by requiring corporations to file at the bank copies of all resolutions of the board of directors authorizing officers to draw corporate checks to their own order. Where there is no such resolution, the bank will not cash the check. Taking a note with an actual suspicion that there is some defect in the transferor's title is taking in bad faith even if full value be given.

Value is any consideration sufficient to support a common-law contract. If the holder suffers any detriment, loss, or injury in taking the instrument, he has furnished value. The disputed question has been whether the taking by Day of a negotiable instrument made by Bowen, and owned by Abel, as collateral security for an old debt due from Abel to Day constitutes Day a holder in due course. The Negotiable Instruments Law and the majority of courts hold that Day is a holder in due course. It is argued that Day suffers no very real detriment in taking the instrument merely as security for a prior debt. If Day took it as security for a debt just then created, or in payment of a past debt, or as security for a binding extension of time upon the old debt, there would clearly be a detriment to Day sufficient to constitute value.

Example 1. "January 5, 1924. Three months after date I promise to pay to the order of Fred Crossley one hundred dollars, value received. GEORGE DEWEY." On February 10 Crossley indorses and delivers the above instrument to Hyland as collateral security for a prior debt which he owed to Hyland. When the note is due, Hyland sues Dewey upon it and Dewey sets up that Crossley procured it by fraud. If Hyland is a holder for value (and without notice of the fraud), this defense is not good against him; otherwise it is good. Is he a holder for value? The prevailing answer is, yes. But if on February 10 Hyland took the note in *payment* of a past debt, or as security for a debt which he incurred on February 10, he would undoubtedly be a holder for value.

4. The holder must not at the time of the negotiation to him have notice of any weakness in the instrument or defect in the title of his transferor.

Notice in the law of negotiable instruments means actual knowledge or knowledge of such facts as to constitute bad faith. It is

the state of the holder's mind that is important. Negligence, even gross carelessness, is not notice, although it may be evidence of bad faith. The question is not, Would an ordinarily prudent man in like circumstances have had notice or have had a suspicion of some defect? but, Did this holder have notice or have a suspicion?

The title of the transferor is defective when he obtains the instrument or any signature thereto by fraud, duress, or other unlawful means, or for an illegal consideration, or negotiates it in breach of faith or under circumstances amounting to fraud.

5. A holder who derives title through a holder in due course is himself a holder in due course, even though he does not comply with the above requirements.

Example 2. Baruch procures from Walter a negotiable instrument by fraud. Baruch negotiates it to Maxey, who is a holder in due course. Maxey negotiates it to Somers, who has knowledge of the fraud (but is not a party to it). Somers is a holder in due course with all the rights of Maxey. This rule protects Maxey, the holder in due course, who otherwise might have the instrument locked up in his hands after knowledge of the fraud became general. But if Maxey negotiated it back to Baruch, the latter would not be a holder in due course, because he was a party to the fraud.

120. Rights of holder in due course. The following rules govern the rights of a holder in due course.

1. The holder in due course holds the instrument free from all personal defenses, and may enforce payment for the full amount against all parties liable upon it; but he does not hold it free from the absolute defenses.

a. Personal defenses are fraud, duress, illegality when not made an absolute defense by statute, want of consideration, release of maker or other party, want of title in the transferor, etc.

Examples. 1. Causer steals a negotiable instrument payable to bearer and negotiates it to Coons, a holder in due course. Coons may recover upon it and may hold it even against the true owner. It is in the latter respect on the same basis as stolen money.

2. Fox induces Pease by a false representation to buy a horse, and Pease gives Fox his promissory note for $100. Fox negotiates the note to Syler, a holder in due course. Syler may recover the full amount. Pease cannot set up Fox's fraud against Syler.

3. Perky gets Allen to make a promissory note without any consideration whatever. Perky negotiates it to Cantley, a holder for value. Cantley may recover from Allen upon it.

4. Eagon anticipates the due date of his note and pays Bull in full, ten days before it is due, leaving the note in Bull's hands. Before it is due Bull negotiates it to Cate, a holder in due course. Eagon must pay it again to Cate.

b. Absolute defenses are forgery, alteration, infancy, illegality when made an absolute defense by statute, want of execution and delivery as and for a negotiable instrument, etc.

Examples. 5. Franklin gives to Duncan a negotiable instrument for a gambling debt. Duncan negotiates it to Hebert, a holder in due course. Hebert cannot recover upon it in those states which by statute have made instruments given for gambling debts void.

6. Webber is asked by Sarge to sign a lease. By a trick Sarge substitutes a negotiable promissory note, which Webber signs, thinking it is the lease. Sarge negotiates the note to Seaman, a holder in due course. Seaman cannot recover upon it unless he shows that Webber was so careless as to work an estoppel. The defense is absolute unless Webber is estopped by reason of his own negligence to set it up against an innocent holder. There was no execution and delivery as and for a negotiable note.

7. Kushner gives to Abbott a note for $10. Abbott alters it to read $100 and negotiates it to Case, a holder in due course. The Negotiable Instruments Law has now provided that Case may recover upon it according to its original terms, namely, to the extent of $10.

2. Every holder is presumed to be a holder in due course. But when fraud, duress, illegality, or defective title has been proved by way of defense, the holder must then show by proof that he gave value, and must show the circumstances under which he took the instrument.

Example 8. Hopkins, the holder, brings an action against Antonetti, the maker. Hopkins proves Antonetti's signature, introduces the note in evidence, and rests his case. This is all the proof necessary, as there is a presumption of consideration and presumption that Hopkins is a holder in due course. But if Antonetti now proves that the note was obtained by Barron (the original payee in the note) by fraud or for an illegal consideration, then Hopkins must prove the value he gave and establish good faith and want of notice by proving the circumstances under which he took the note.

IV. Maker's and Acceptor's Contract

121. Maker's contract on a promissory note. The maker of a promissory note contracts that he will pay it absolutely. No step by the holder after the note is due is necessary to fix the maker's liability. The holder need not for this purpose seek out the maker or present the note to him. If it is not paid when due, the holder may at once bring an action against the maker and recover from him.

Presentment to the maker when due is necessary to fix the liability of an indorser but not to fix the liability of the maker himself.

122. Acceptor's contract on a bill of exchange. An acceptor's contract is absolute. It may be upon the bill or in a separate instrument. Only the drawee can accept.

1. *The contract.* When the drawee of a bill of exchange accepts it by writing his name, usually with the word "Accepted" across the face of the bill, he thereby undertakes that he will pay the bill according to the terms of his acceptance. He also admits that the drawer's signature is genuine and cannot afterward dispute that point. An acceptance may be general or qualified.

a. If the acceptance is general and unqualified, the acceptor agrees to pay according to the terms of the bill; that is, he assents fully to the order of the drawer as to date and amount of payment, etc. He is then liable like the maker of a promissory note.

b. If the acceptance is qualified, the acceptor changes the terms of the bill, that is, does not assent fully to the order of the drawer. An acceptance is qualified if it makes payment depend upon any condition, or is for only a part of the amount specified, or changes the time of payment, or positively changes the place of payment. Changing the place of payment does not necessarily qualify the acceptance so long as the new place is not made the exclusive place of payment. "An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere." The holder may refuse to take a qualified acceptance and may protest the bill for nonacceptance. If he does take it, he releases the drawer and prior indorsers unless they also consent to the change or after due notice of it fail to object.

Examples.

$500 CINCINNATI, Feb. 27, 1925

Thirty days after sight pay to the order of Foster McKinnon five hundred dollars, and charge to the account of

ALBERT HOWARD

To JOHN DRURY,
Chicago

1. "Accepted, March 7. JOHN DRURY." This is a general acceptance. The date of acceptance should be added to fix the due date, since the bill is payable not thirty days after date, but thirty days after sight. It is due thirty days from March 7, namely, on April 6.

2. "Accepted, March 7, 1925, payable at the Franklin National Bank. JOHN DRURY." This is still a general acceptance, although it specifies a place of payment and to that extent qualifies the bill. Custom has permitted this.

3. "Accepted, March 7, 1925; payable at the Franklin National Bank only. JOHN DRURY." This is qualified. It positively changes the place of payment, which by the terms of the bill would be at Drury's place of business.

4. "Accepted, March 7, 1925, when in funds. JOHN DRURY." This is qualified. There is a condition which may never be fulfilled.

5. "Accepted, March 7, 1925, for $350. JOHN DRURY." This is qualified. It changes the amount.

6. "Accepted, March 7, 1925, payable April 16, 1925. JOHN DRURY." This is qualified. It changes the time of payment from thirty days after sight to forty days after sight.

If the holder takes acceptance 3, 4, 5, or 6, he releases the drawer (Howard) from liability unless, after due notice of the kind of acceptance, the drawer fails within a reasonable time to object. If the holder will not take these acceptances, he must protest the bill and give the drawer due notice of dishonor.

2. *Acceptance by separate writing. Letter of credit.* The holder is entitled to have the drawee accept upon the bill itself, and may treat the bill as dishonored if he refuses to do so. But an acceptance on a separate sheet of paper is perfectly valid and binds the acceptor in favor of the holder and all who afterward take the bill on the strength of such acceptance. Moreover, there may be a promise in writing to accept a bill or bills thereafter to be drawn, and this binds the acceptor in favor of all who take the bill or bills for value upon the faith of such a written promise. A letter of

No. 5622

The Union National Bank of Los Angeles

Los Angeles, Cal., Aug. 16 19 25

Messrs. P Yamakuchi & Co.

Yokohama, Japan

Sirs:

You are hereby authorized to value on ----------us----------

----------*at*----------ninety days sight----------

for account of ----------Brown, Cantwell & Co., Los Angeles----------

for any sum or sums not exceeding in all ----------Five thousand----------

----------dollars----------

to cover shipment of ----------silk----------

to be shipped to ----------San Francisco----------

The Bills of Lading to be filled up to ----------order----------

The shipment must be completed and the Bills drawn within -------six-------
months from this date and the advice of them together with the drafts
in duplicate must be accompanied by Bill of Lading with an abstract of Invoice endorsed thereon on receipt of which documents the Bills will be duly accepted.

And The Union National Bank of Los Angeles hereby agrees with the drawers, endorsers and bona fide holders of Bills drawn in compliance with the terms of this Credit, that the same shall be duly honored on presentation.

Drafts under this Credit must be endorsed hereon and contain the clause Drawn under Credit No. --5622---*of The Union National Bank of Los Angeles, California, dated* ------Aug. 16, ------1925

for ----------

Yours very truly,

The Union National Bank of Los Angeles

Caldwell Patrom *President*

C. Dewitt Abbey *Cashier*

The user of this Credit will please send Consular Certificate and Bill of Lading under cover to

----

Insurance provided ----------

SPECIMEN

LETTER OF CREDIT

credit issued to travelers in order to enable them to obtain money in foreign cities is merely a banker's written promise to accept bills drawn upon him up to a certain amount.

Example 7. De Rasch, who is going abroad, buys of a Boston banker a letter of credit for £200. The letter names De Rasch, describes him,

contains his signature, and says to foreign bankers that the Boston bank will accept bills drawn upon it by De Rasch up to £200 if each bill refers to the Boston bank's "letter of credit No. —." Each draft so cashed by a foreign bank is entered upon the letter of credit, so that the balance undrawn is always a simple matter of computation. The foreign banker compares De Rasch's signature on the draft with the signature on the letter, and satisfies himself in all reasonable ways that the person drawing the bill is the person named in the letter. He then discounts the bill and forwards it to Boston (or it may be, by arrangement specified in the bill, to London), and the Boston banker is bound to pay it, because he has promised in advance to do so.

3. *Who may accept.* No one but the drawee named in the bill can accept it. But there are two exceptions to this rule. (1) A bill may refer to a secondary person to whom resort shall be had in case the bill is dishonored by the first drawee. Such a person is called a "referee in case of need." The usual form is to write below the drawee's name, "In case of need apply to John Brown." The holder may resort to the secondary person if he chooses. (2) When the bill has been dishonored by the drawee, any person can accept it for the honor of the drawer or a prior indorser. This acceptance is called "acceptance *supra protest* for honor." Such acceptor becomes liable to the holder upon condition that the bill be again presented to the drawee when the bill is due, for payment, and if not paid that it be protested and due notice of nonpayment given to the acceptor for honor.

123. Presentment of bill of exchange for acceptance. Presentment for acceptance is for the purpose of ascertaining whether the drawee intends to pay the bill when it is due. Presentment may be necessary or it may be optional with the holder.

1. *When necessary.* When a bill is payable after sight, it must be presented for acceptance in order to fix the date when it is due. A failure so to present it to the drawee within a reasonable time after it is issued, or after its last negotiation, would discharge the drawer and the indorsers. A bill payable at a certain day need not be presented for acceptance; it is enough to present it for payment when that day arrives. Such a bill may, however, be presented for acceptance before its maturity, if the holder wishes to do so. The drawee is allowed twenty-four hours to decide

whether to accept; if he refuses to return the bill after twenty-four hours, he is deemed to have accepted.

2. *How and when.* Presentment to the drawee for acceptance must be by or on behalf of the holder at a reasonable hour of a business day. Presentment cannot be on holidays; if Saturday is not otherwise a holiday, presentment for acceptance (but not for payment) may be made before twelve o'clock noon of that day. Presentment of a bill naming two or more drawees must be made to all, unless they are partners, when presentment to one is sufficient. Presentment is excused if the drawee is dead or has left the country, or if after the exercise of reasonable effort he cannot be found.

3. *Refusal to accept.* If the drawee refuses to accept the bill, the bill is said to be dishonored. In such case the holder must give due notice of the fact to the drawer and indorsers, in order to hold them liable on the instrument; if he fails to do so, they are discharged from liability. If the bill is a foreign bill (see section 109 *ante*), the holder must also have it protested, that is, presented by a notary public and certified by him as duly presented and dishonored.

4. *Effect of acceptance.* If the drawee accepts the bill, the holder retains it until the bill is due or negotiates it, and then he or the new holder presents it again for payment when it is due. If it is not then paid, the bill is dishonored and must be protested and due notice given to the drawer and indorsers. A failure to take these steps discharges the drawer and prior indorsers.

V. Drawer's and Indorser's Contract

124. Drawer's contract on a bill of exchange. The drawer's contract is conditional. He undertakes that he will pay the bill on these conditions: (1) that it be duly presented to the drawee for acceptance if the bill is payable after sight, or be presented for payment if payable at a fixed time; (2) if it be dishonored, that due notice of that fact be given to the drawer; (3) if a foreign bill be dishonored, that it be also duly protested.

These conditions are strict, and in order to hold a drawer they

must be strictly complied with unless a recognized excuse be shown for not doing so. The steps necessary to fulfill these conditions are treated in sections 126–128 *post*.

125. Indorser's contract on a bill or note. The indorser's contract is both a contract that the bill will be paid and a contract of warranty. One who negotiates without indorsement also gives certain implied warranties.

1. *Contract to pay.* An indorser by an unqualified indorsement agrees that he will pay the bill or note upon these conditions: (1) that it be duly presented to the acceptor or maker for payment or, if payable after sight, to the drawee for acceptance; (2) if it be dishonored, that the indorser be given due notice of that fact; (3) if it be a foreign bill, that it be duly protested. A qualified indorser ("without recourse") does not undertake any contract to pay, but he does undertake a contract of warranty.

2. *Contract of warranty.* The indorser in transferring negotiable paper also impliedly warrants (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has good title to it; (3) that all prior parties had capacity to make negotiable instruments (that is, were not under some such disability as unsound mind); (4) that the instrument at the time of his indorsement is a valid and existing obligation. An indorser by qualified indorsement, or a transferor by delivery alone, impliedly makes the same warranties, except that instead of (4) he warrants that he has no knowledge of any fact which would impair the validity of the instrument or render it useless. The sale of a negotiable instrument is in some respects like the sale of goods and has warranties accompanying the sale.

Examples. 1. Gray by delivery without any indorsement sells to Ames a note of Bricker payable to bearer. Unknown to either Gray or Ames, Bricker's name is forged. Ames may maintain an action against Gray for breach of the implied warranty of genuineness. The same result would follow if Gray had indorsed "without recourse" or had made an unqualified indorsement. In the latter case, however, he would have been sued upon his contract to pay.

2. In the above case, instead of forgery, Bricker pleads infancy and escapes liability. Gray is liable to Ames for breach of the warranty that prior

parties had capacity to contract. If Bricker pleads that the note was given for a gambling debt and thus escapes liability, Gray is liable for breach of the warranty that it is valid. The Negotiable Instruments Law, however, makes a seller by delivery or by qualified indorsement liable in the case of the gambling note only if he knows the instrument is invalid.

3. *Order of indorsers' liability.* If there are several indorsers upon a negotiable instrument, they are, as among themselves, presumed to be liable in the order in which they indorse; but it may be shown by proof that they agreed otherwise.

Examples. 3. A note made by Knaft payable to Garland is indorsed Garland, Moody, Sanger, Tallmadge, and is in the hands of Beecher. Beecher presents the note at maturity to Knaft, who refuses payment, and Beecher notifies each indorser. Beecher may sue any one of them. Suppose he recovers from Sanger. Sanger may then recover from either Garland or Moody, but not from Tallmadge, because, had Tallmadge paid, he could have recovered from the prior indorsers, of whom Sanger is one. If Sanger recovers from Moody, Moody may then recover from Garland. The only recourse of Garland is against Knaft, the maker.

4. If Garland, Moody, Sanger, and Tallmadge are shown by proof to have agreed to become joint indorsers, then, if Sanger paid Beecher, Sanger could recover one fourth of the payment against Garland, Moody, and Tallmadge respectively.

4. *Irregular indorser.* An irregular indorser is one who indorses before the payee, and generally to lend his credit to the maker, although it may be to lend his credit to the payee. If an instrument is made by Kendall payable to the order of Tatum, we expect to see Tatum's indorsement first in the list; if we find Dupres' first, we call Dupres an irregular indorser. Under the Negotiable Instruments Law the rule is that if Dupres indorses in blank before delivery to Tatum, he is liable to Tatum as indorser; but if he indorses to accommodate Tatum, he is not liable to Tatum although he is liable to subsequent holders.

5. *Accommodation indorser.* An accommodation indorser is one who indorses in order to lend his credit to another party to the instrument. The simplest case is where Bender wishes to borrow money at a bank and asks Hendee to lend his credit. In such case Bender makes a promissory note payable to Hendee's order,

Hendee indorses it in blank, and Bender discounts it at the bank. Had Hendee been the ordinary payee, he would have owned the note and discounted it himself. Suppose Hendee had owned it, but the bank would not discount it on Hendee's and Bender's credit. Hendee asks Roesser to lend his credit. Hendee indorses the note in blank, Roesser then indorses it in blank, and Hendee discounts. Roesser is the accommodation indorser for Hendee, the payee. If Roesser's signature appears before that of Hendee, he is called an "irregular indorser."

6. *Guarantor.* A guarantor is one who writes a guaranty upon the back of a negotiable instrument, instead of writing an ordinary indorsement. His contract is to pay if the maker or other prior party does not, without any condition as to presentment or notice. It is generally held that when a negotiable instrument with a general guaranty written upon it is negotiated, there is also an implied assignment of the guaranty to the new holder.

Example 5. Hayler makes a negotiable note payable to the order of Lowry, who writes upon the back, "For value received, I hereby guarantee the payment of the within note. LOWRY," and delivers the note to Strong. The latter indorses it, "Pay to Northup. STRONG," and delivers it to Northup. At maturity Northup presents it to Haylen, who refuses payment. No notice is given to Lowry. It is generally held that the guaranty passed by implied assignment with the negotiation of the note to Northup, and Northup may recover upon it as assignee of Strong, and no notice to Lowry is necessary. The better way for Strong is to take an indorsement by Lowry and avoid these questions. If Strong wishes to escape the risks of presentment and notice, he should have Lowry indorse "waiving protest."

126. Presentment for payment. The first condition in the drawer's and the indorser's contract is that there shall be due presentment upon the maker or acceptor for payment. Unless this condition is met, the drawer or indorser will be discharged from all liability except in case he waives the condition or some permitted excuse be shown for not fulfilling it. We have therefore to consider how and when presentment of a negotiable instrument is to be made in order to fulfill this condition.

1. *Time of presentment.* If the instrument is payable at a fixed

time, presentment must be made on the day fixed.[1] If this falls on Sunday or a holiday, the instrument is payable on the next succeeding business day. If the due day falls on Saturday, the Negotiable Instruments Law provides that the instrument is to be presented the next Monday unless Monday is a holiday.

If the instrument is payable on demand, presentment must be made within a reasonable time after its issue or, in case of bills (not checks), a reasonable time after the last negotiation. Demand instruments may be presented on Saturday up to twelve o'clock noon, unless Saturday happens to be wholly a holiday.

Presentment must be at a reasonable hour on a business day. This ordinarily means business hours, but presentment at a residence at a later hour may be justified by circumstances.

In computing time a month is a calendar month. Thus, a note dated January 30, due one month from date, is due February 28 or, in leap year, February 29. If dated February 28 and due in one month, it would be due on March 28. In computing days the actual time is taken. A note dated October 13 and due in ninety days is due January 11. If the due date so fixed is a holiday, the next business day is taken as the due date. The day of the date is excluded in both cases. A note dated January 1 and due one month from date is not due January 31, but February 1. A note dated January 1 and due thirty days from date is due January 31, not January 30.

2. *Place of presentment.* Where a place of payment is stated in the instrument, presentment must be at that place. Where no place is stated, the place of business of the maker or acceptor is understood or, if he has no place of business, his residence. If neither place of business nor residence can be found, then presentment may be made to the maker or the acceptor wherever he may be, or at his last-known place of business or residence.

Example 1. A note is made "payable at the Merchants' National Bank." Presentment must be made at the bank. Presentment at the maker's place of business would not be good. The note is equivalent to an order by the maker to the bank to pay the same and charge the amount against his deposit. If the note is deposited in the bank by the holder and is there on the day of maturity, presentment is complete.

[1] If days of grace are allowed, three days must be added before the presentment can be made. We shall assume that days of grace are abolished. (See section 110, *ante*.)

3. *Mode of presentment.* The instrument must be shown to the maker or acceptor (or drawee) and payment demanded; if it is paid, the instrument must be delivered up. If the instrument is secured by collateral such as pledged bonds, the collateral also must be delivered up.

4. *To whom presented.* Presentment of a note is made to the maker or, if he is absent from the place or not capable of being reached, to any person found in charge of his place of business. Presentment of a bill is made to the drawee for acceptance or to the acceptor for payment in the same way. If the maker or acceptor is dead, presentment may be made to his personal representative (executor or administrator). If an instrument is made by partners, presentment to one is sufficient; but if made by joint parties who are not partners, presentment must be to all of them before the instrument can be deemed to be dishonored.

5. *Excuse for delay.* If circumstances beyond the control of the holder cause a delay in presentment beyond the day of maturity, this delay will be excused if presentment is made with reasonable diligence after the cause of delay has passed.

Example 2. Gilman in Omaha holds a note on Mordecai payable in Chicago. Gilman forwards it by mail in due season to his agent in Chicago. The mail train is wrecked and the mail is delayed until the day of maturity is passed. The note arrives in Chicago two days after maturity and is promptly presented. The presentment is sufficient, as the delay is excused.

6. *Presentment dispensed with.* If after reasonable effort the holder cannot make any presentment upon the maker or acceptor, presentment is dispensed with. Such would be the case if the maker could not be found in any place of business or residence. Reasonable effort requires that the holder make proper inquiries as to the residence of the maker.

7. *Waiver of presentment.* The indorser may waive presentment. This is often done by writing above his indorsement the words "waiving presentment" or "waiving protest." But the waiver may be oral and may be made at any time. A promise to pay after he is discharged for nonpresentment, if made with knowledge of the fact, will constitute a waiver.

8. *Effect of dishonor.* If the instrument, after presentment to the maker or acceptor (or drawee), is dishonored by nonpayment (or nonacceptance), the first condition in the drawer's or indorser's contract has been fulfilled. It then remains for the holder to take the next step and give due notice of the dishonor and, in case of a foreign bill, have due protest made.

9. *Payment for honor.* Where a bill has been protested for nonpayment, any person may intervene and pay it *supra protest* for the honor of any person liable thereon. This must be witnessed by a notarial act of honor founded upon the declaration of the payer as to his intention to pay the bill for the honor of the person named. The payer then pays the holder and takes the bill. All parties subsequent to the one for whose honor he paid are discharged, but the person for whose honor he paid and all prior persons are liable to the payer for honor.

127. Notice of dishonor. The second condition in the drawer's or indorser's contract is that due notice shall be given him that the party primarily liable has dishonored the instrument by refusing to pay it, or it may be in the case of a bill by refusing to accept it. Failure to give such notice will discharge the drawer or indorser unless he has waived notice or unless some reasonable excuse is shown for not giving it. We must therefore consider what is due notice.

1. *By whom notice given.* The holder may give the notice, or his agent may give it, or a notary employed by him may give it. A notary is employed to present the instrument whenever it is intended to protest it, and the notary may give the required notice also.

In addition, any party who, by getting notice, is himself liable to the holder may give notice to a prior party who would be liable to him.

Example 1. Baldwin is the maker, Daly, Cohn, Brauch, and Dugan are indorsers, and Haskin is holder, of a note. Haskin presents the note to Baldwin, who refuses payment. Haskin gives notice of dishonor to Brauch; Brauch gives notice of dishonor to Cohn; and Cohn gives notice to Daly. The liability of Daly, Cohn, and Brauch is fixed. But Brauch could not give notice to Dugan, because, if Brauch paid Haskin, Brauch could not

recover from Dugan. The notice by each indorser to his prior indorser works to the benefit of the holder, who could sue Daly or Cohn or Brauch as he might choose. Of course Haskin might have given notice to all four had he wished. The holder may choose which of the indorsers he will give notice to; each indorser so notified should make sure that his prior indorsers have also been notified or should notify them himself.

2. *Form.* The notice may be written or oral. It is sufficient if it describes the instrument and indicates that the instrument has been dishonored by nonacceptance or nonpayment. The notice may be delivered personally or it may be sent by mail. When notice of dishonor is in due time properly addressed and stamped and deposited in the post office or regular letter box, the sender is regarded as having given due notice, notwithstanding any later loss in the mails.

3. *Time allowed.* If the person giving and the person receiving the notice reside in the same place, personal notice must be given at a reasonable hour of the day of dishonor or of the day following, and a notice by mail must be deposited in the post office in time to reach the person to whom the notice is being given in the usual course of the mail not later than the day following.

If the person giving and the person receiving the notice reside in different places, the notice should be deposited in the post office in time to go out by a mail not later than the day following the day of dishonor or, if there be no mail at a convenient hour of that day, by the next mail thereafter. Notice in this case might also be personal, but it must be so given as to reach the drawer or indorser as soon as if sent by mail.

Where the holder gives notice to an indorser, the indorser has, after receiving such notice, the same time for giving notice to a prior indorser.

Example 2. The holder, Larson, resides in New York; the third indorser, Cadman, resides in Chicago; the second indorser, Button, in San Francisco; the first indorser, Alderson, in New York. Larson on April 1 presents the note and it is dishonored; on April 2 Larson mails notice to Cadman which is received by him in Chicago on April 4; on April 5 Cadman mails notice to Button which is received by him in San Francisco on April 9; on April 10 Button mails notice to Alderson which is received by

him in New York on April 16. Each notice is duly given, and the liability of all indorsers is fixed. If Larson had notified Alderson, the notice would have been received by Alderson on April 2.

4. *Place.* If the drawer or indorser has added an address to his signature, notice of dishonor must be sent to that address. If he has not added an address, then notice must be sent either to the post office where he is accustomed to receive his letters or to the post office nearest to his place of residence. If he lives in one place and has a place of business in another, notice may be sent to either place. If he is living temporarily in another place, notice may be sent to that place. If notice is actually received within the time allowed, it will be good, though it may have been sent to the wrong place.

Examples. 3. The indorser lives in Boston but is a senator and is living temporarily at Washington. Notice may be sent either to Boston or to Washington. If the indorser is on a mere temporary, indefinite visit, notice may not be sent to him at such place.

4. The indorser lives in Montclair, New Jersey, and has a place of business in New York City. Notice may be sent to either place.

5. The indorser has a city residence in Toledo and a summer residence at Wishawaukee, Michigan. Notice should ordinarily be sent to Toledo but may be sent to the summer residence if the indorser is there.

5. *Waiver of notice.* Notice may be waived by drawer or indorser. It may be waived orally or in writing, and either before or after the time for it has arrived. The usual method is to write "Waiving notice" or "Waiving protest" above the indorsement. The phrase "Waiving protest" is construed to cover all steps,—presentment, notice, and protest,—but "Waiving notice" does not dispense with presentment or protest. The indorsement "Waiving protest" makes the indorser really a guarantor.

6. *When notice is excused.* Notice is excused when, after the exercise of reasonable effort, it cannot be given or when, in the case of notice by mail, it does not reach the person to whom it was sent. Reasonable effort requires that suitable inquiries should be made to learn the indorser's address. Merely looking in a directory is not enough. Notice need not be given to a drawer who has no

right to expect that the drawee would accept or pay the bill, as where he draws upon one who has no funds of his and who has made no agreement, expressed or implied, to honor his bills. Notice need not be given to an indorser for whose accommodation the instrument was made or accepted.

Example 6. A promissory note is made by Goldman payable to the order of Burchard and is indorsed by Burchard and discounted by Burchard. Goldman signed the note as accommodation to Burchard merely, that is, lent to Burchard his credit to raise money. In such a case Burchard is not entitled to notice of nonpayment, because it is Burchard's duty to provide for payment, and not Goldman's.

7. *Effect of failure to give notice.* If a bill is presented for acceptance, and acceptance is refused, a failure to give the drawer and indorsers (if any) notice of this fact will discharge the drawer and indorsers as to this holder. The bill, however, is not yet due, and it is therefore possible for the holder to negotiate it to a holder in due course who does not know that it has been dishonored; as to such a holder the drawer and indorsers are not discharged.

If a bill or note is presented for payment and payment is refused, the failure to give notice will discharge the drawer or indorsers as to this holder and all subsequent holders, because as the bill or note is now due there can be no negotiation to a holder in due course, unless, indeed, it be at a later hour on the same day of maturity.

If a bill has been dishonored by nonacceptance and due notice given, and it is afterward presented for payment and dishonored, no further notice need be given, unless the bill was accepted between the date of first presentment for acceptance and the date of presentment for payment.

If a bill has been dishonored by nonacceptance and no notice given, and it is afterward negotiated to a holder in due course, the latter must present it for acceptance or payment and upon dishonor give due notice.

128. Protest. Protest is a solemn declaration by a notary public in behalf of the holder against any loss to be sustained by the holder because of the nonacceptance or nonpayment of a bill or note. The word "protest" means "to testify before," and a pro-

test is therefore testimony before or in the presence of the notary that the instrument has been presented, demand for acceptance or payment made, such demand refused, and the instrument dishonored, followed by a formal declaration, or "protest," that any loss arising therefrom shall be borne by the drawer or indorsers

United States of America

STATE OF CONNECTICUT,
CITY AND COUNTY OF HARTFORD, } ss.

Be It Known *THAT, on the* 14th *day of* July *A. D. 19* 25 *at the request of The Connecticut Trust Company,* **I,** B. C. Snow *a Notary Public, duly commissioned and sworn, residing in the city of Hartford, did present the original* note *hereunto annexed for $* 426.12 *and demanded payment thereof, which was refused for the reason given.*

Whereupon I, *the said Notary, at the request aforesaid, did PROTEST, and do hereby publicly and solemnly PROTEST, against the Makers, Drawers, and Endorsers of the said* note *and all others concerned, for all exchange, re-exchange, all costs, damages and interest, incurred or to be incurred for want of payment of the same.*

And I the said Notary, do hereby certify that on the same day, I deposited in the post office at Hartford, Conn., prepared Notices of protest of said note *addressed as follows, viz:*

William J. Deverz, 14 Birkman St., New York City,

Blinkison & Blevins, 632 Bayview Ave., Providence, R. I.

This done and protested in the city of Hartford, aforesaid, and my Notarial Seal affixed, the day and year above written

FEES	
Noting Protest	$0.25
Entering	.50
Recording	.25
Affixing Seal	.25
Notices	
Travel	
Postage	

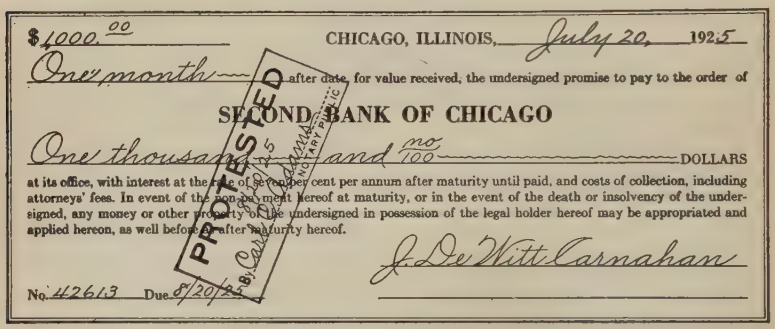
[*Notary's Seal*]

B. C. Snow
Notary Public.

CERTIFICATE OF PROTEST

and not by the holder. In practice the notary must himself make the presentment and demand, in order that he may have this evidence of dishonor; he cannot, unless statutes so provide, take the word of the holder or any other person as to these facts, or protest an instrument because someone told him it had been dishonored. In case a notary cannot be found to make such protest, it may be made by any respectable citizen of the place where the dishonor occurs, in the presence of two or more trustworthy witnesses.

Protest *must* be made in the case of foreign bills of exchange, for in such cases the notary's certificate is the only admissible evidence of presentment, demand, and dishonor. Protest *may* be made in the case of other negotiable instruments, and the notary's certificate used as evidence, but protest is not necessary, and the fact of dishonor may be proved by the oral evidence of the person making presentment and demand. It is now usual to protest all negotiable instruments, particularly those payable at a bank. In most banks some clerk is a notary, and if at the close of business


$1000.00 CHICAGO, ILLINOIS, July 20, 1925

One month after date, for value received, the undersigned promise to pay to the order of

SECOND BANK OF CHICAGO

One thousand and no/100 DOLLARS

at its office, with interest at the rate of seven per cent per annum after maturity until paid, and costs of collection, including attorneys' fees. In event of the non-payment hereof at maturity, or in the event of the death or insolvency of the undersigned, any money or other property of the undersigned in possession of the legal holder hereof may be appropriated and applied hereon, as well before as after maturity hereof.

J. De Witt Carnahan

No. 42613 Due 8/20/25

PROTESTED

PROTESTED PROMISSORY NOTE

hours his examination of the books shows that the maker of an instrument has not funds there to pay it, he protests the instrument.

The notary also usually gives the necessary notice of dishonor to the drawer or indorsers, but this may be done by the holder or by any other agent of his. If the notary gives such notices, he may include a statement to that effect in his certificate. Practice in that respect varies. If the statement that notices have been duly given is not included in the certificate, that fact would have to be proved at a trial by the oral evidence of the notary or other person who gave the notices.

When protest has been made, the notary prepares a certificate under his hand and seal setting forth (1) the time and place of presentment; (2) the fact that presentment was made and the manner thereof; (3) the demand made and the answer given, or the fact that the drawee, acceptor, or maker could not be found;

(4) the cause or reason for protesting the instrument. This certificate is annexed to the instrument protested, or to a copy thereof, and is handed to the holder of the instrument as his evidence of presentment, demand, and dishonor. It may also, of course, contain evidence that notices were duly sent to the drawer or indorsers.

The protest must be at the place where the instrument is dishonored and on the day of the dishonor. But it is not essential

Hartford, Conn., May 11, 1925

Sir:

Please to Take Notice *that a* note

made by Wilson Coghlan *on*

for Three hundred *Dollars,*

daled Feb. 11, 1925 *payable* May 11, 1925

to the order of Milo C. Schackiro

at Worcester National Bank,

Worcester, Mass.

and endorsed by you, due this day, is PROTESTED *for non-payment; payment having been duly demanded and refused. The holders look to you for payment thereof with all damages and cost.*

Very Respectfully,

Ward A. Bleamer
Notary Public

To Weems & Shortall

NOTICE OF DISHONOR

that the certificate should be made on that day. Protest itself may be sufficiently indicated by a "noting" on the bill or note in very brief form, thus: "Payment demanded and refused, 27 April, 1925. B. L. J. Fees 75¢." This means that on that date the notary whose initials are written made due presentment and demand, that the instrument was dishonored and protested, and that the notary's charges are 75 cents. The notary may at any subsequent date "extend" the protest by making out his formal certificate.

The costs of protest are added to the amount to be paid by any

party liable on the instrument. These fees are fixed by statute and include so much for protest and so much for each notice of dishonor. There is also added interest from the time the instrument was due until the drawer or prior party pays it to the holder.

In case of a foreign bill the holder may recover the cost of re-exchange. This is measured by the sum for which a sight draft must be drawn on the drawer of the dishonored bill, in order to realize immediately the amount of the dishonored bill plus the cost of protest.

Example. Gifford in London draws a bill for $1000 on Edwards in Chicago, and it is transferred to Harris in Chicago, who presents it for payment. It is dishonored and the protest fees amount to $1.25. It is obvious that Gifford now owes Harris on that day $1001.25. Harris may draw a sight draft on Gifford for such a sum as at the ruling rate of exchange between Chicago and London will realize in Chicago $1001.25. The difference between that sum (say $1081.35, American money) and the sum realized ($1001.25) is the cost of reëxchange which must be borne by Gifford.

In the United States the matter of reëxchange has been simplified by statutes which fix a definite percentage on a foreign bill to be recovered in place of reëxchange. This varies in different states, but the amount is from 10 per cent upward.

129. Checks. The contract of the drawer of a check is different from that of the drawer of an ordinary bill of exchange so far as concerns presentment and acceptance.

1. *Presentment.* A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon *to the extent of the loss caused by the delay.* If he is not damaged at all, he will not be discharged, no matter how long the delay.

Example. Challis draws a check for $100 and delivers it to Fearne, who keeps it six months. In the meantime the bank fails. When it failed Challis had more than $100 on deposit. The bank pays 40 per cent to depositors. Fearne may recover from Challis $40 on the check, but not the other $60, because Challis is damaged to that extent by Fearne's delay. Had this been a bill of exchange payable on demand, Challis would have been discharged altogether by Fearne's unreasonable delay.

A reasonable time for the presentment of a check is much shorter than that for the presentment of a bill and cannot be lengthened by negotiation. If the holder and the bank are in the same place, the check should be presented before the close of banking hours on the next business day following the day of its issue. If the holder resides in a different place, the check should be started, not later than the day following its delivery, by a reasonably direct route to the place where the bank is located. The sending of checks by indirect routes through various correspondent banks has been held in some states to amount to unreasonable delay in presentment.

Before a check has been certified by a bank or actually paid, the drawer may stop payment on the check, that is, order the bank on which the check is drawn not to pay it. Whether this is rightful or wrongful as against the person to whom the drawer has given the check, the bank must obey the instructions of the drawer and refuse to pay the check.

2. *Certification.* If the holder of a check procures it to be certified, the drawer and indorsers (if any) are discharged from further liability. This is because when a holder takes the check to the bank to be certified he is entitled to the money and elects to take the promise of the bank in place of it. But if the drawer procures it to be certified before delivery to the payee, the latter takes the check with the same effect as an accepted bill of exchange. When a check is certified, the bank immediately charges up the check to the depositor's account so as to preserve a fund from which to pay the check.

3. *Rights of holder of check.* A holder of an uncertified check has, ordinarily, no rights against the bank upon which it is drawn, even though the drawer has funds enough there to pay it. The promise of a bank to honor the checks of a depositor runs to the depositor only, and the payee of the check cannot sue the bank, any more than the payee of a bill of exchange can sue the drawee before acceptance. The only right of the payee is to present the check promptly and, in case it is dishonored, give the drawer due notice, and thereafter sue the drawer.

4. *Rights of drawer against bank.* If a bank wrongfully dis-

honors a depositor's check, the depositor has an action against the bank for the injury to his credit. If he is a business man, the damage to credit is presumed to follow such dishonor, and he may recover a substantial sum in the discretion of the jury.

130. Position of indorser after liability is fixed. After the necessary steps have been taken to fix an indorser's liability (or without such steps if he has waived them), the indorser's position is essentially that of a guarantor. His rights and remedies are those already discussed under the head of "Guaranty" (see sections 106–108 *ante*).

If an indorser pays an instrument upon which he is liable, he is entitled to the possession of the instrument and may proceed upon it against all prior parties. He may strike out his own and all subsequent indorsements, and again transfer the paper if he wishes.

REVIEW QUESTIONS AND PROBLEMS

109. In what sense is a negotiable instrument an instrument of credit? In what sense an instrument of trade? Illustrate methods of payment. What are the principal kinds of negotiable instruments? Explain the use of a bill of exchange. Distinguish inland and foreign bills. Is a check a bill of exchange? Name different kinds of promissory notes. Are bills of lading and warehouse receipts negotiable?

110. What are the three characteristics of negotiable instruments? Explain each. Are there three days of grace in your state? What distinguishes negotiation from assignment? Illustrate.

111. Define bill of exchange. Name the parties in a bill of exchange. What is acceptance? How is a bill transferred? What are bills in sets? What two different purposes does a bill in a set serve? What is a trade acceptance? a banker's acceptance? Define promissory note. What is the effect of stating a place of payment? Is it necessary? Explain discount. What is a certificate of deposit? What is a check? What is a certified check? What is a cashier's check and what is it used for? What is a cashier's bill of exchange? What is a bond? When is it negotiable? What is a coupon bond?

112. What is the Negotiable Instruments Law? Where is it in force? What is its effect?

113. State the five essentials of a negotiable instrument. How should a negotiable instrument be signed by Fred Loomis if he is agent for Carlos Lathrop and if he is treasurer of the Lathrop corporation?

Problem 1. A promissory note is signed "Charles Warren, President; C. F. Leach, Treasurer." It reads, "We promise to pay etc." Across the end is printed, "Warren Manufacturing Co." The note has been transferred to a holder in due course, who sues Charles Warren and C. F. Leach personally. They set up that it is the note of the Warren Manufacturing Co. Result?

Problem 2. "I, Thomas Bowser, promise to pay to the order of Henry Hatcher one hundred dollars on July 1." Action is brought against Thomas Bowser upon a promissory note. Result?

Problem 3. A check on a savings bank reads: "Industrial Savings Bank. Pay to Watson Cherry or order one hundred dollars and charge to my account, No. 25. Woodall Blair." Underneath is printed, "The bank book of the depositor must accompany this order." Is this negotiable?

Problem 4. "I promise to pay to the order of Charlie Crum one hundred dollars and also one half the net profits of the sale of our crop of oats. Fritz Tauber." Is this negotiable?

Problem 5. "I promise to pay to the order of Ollie Olsen one hundred dollars on July 1, with interest at 6 per cent, or 10 per cent if not paid at maturity, and with costs of collection if not paid at maturity. Dawson Davis." Is this negotiable?

Problem 6. "I promise to pay to the order of Morgan Hewitt one thousand dollars within one year after he is married. Hart Simpson." Is this negotiable?

Problem 7. "I promise to pay to the order of Merritt Todd five hundred dollars ninety days after the dissolution of the partnership between him and me. Calvin Ewart." Is this negotiable?

Problem 8. Bohlen's clerk made out checks to imaginary persons and Bohlen signed them, thinking they were for persons who had dealings with his concern. The clerk indorsed the imaginary names, obtained the money, and left the state. The bank charged the checks to Bohlen's account. Bohlen claims they should not be charged to him and that the bank should stand the loss. Which is right?

114. What must a negotiable instrument not contain? State the exceptions to this rule.

Problem 9. "I promise to pay to Henry Purcell or order one hundred dollars, or at my election deliver to him one share of stock in the Standard Oil Company. Fletcher Finch." Is this negotiable?

115. Need a negotiable instrument state the consideration given for the note? Why? What is the effect of issuing a negotiable instrument without any date on it? without a place of issue or payment? What is the effect of adding a seal on the note?

116. When a note is issued with blanks, state what may be done as to filling them. What is the effect if it is issued without a blank but with a partly filled space?

Problem 10. A note made by Parks Ingram and indorsed by Alden is issued June 10, but without any date expressed, and is payable "one month after date." It is transferred to Blackmore, who inserts the date June 1 and transfers it to Cassel. It is presented July 1, and on dishonor due notice is given to Alden and Blackmore. Are they liable?

117. Is delivery necessary? When is it conclusively presumed? When not? Illustrate.

Problem 11. Loftus writes his name on a blank piece of paper to verify his signature. Lacey writes above the signature a promissory note for fifty dollars payable to his order, indorses it, and transfers it to Gregg, who is a *bona fide* holder for value. Is Loftus liable to Gregg?

118. What is negotiation? How is it accomplished? What is a blank indorsement? a special indorsement? an unqualified indorsement? a qualified indorsement? a restrictive indorsement? an indorsement waiving conditions? When is a transfer a mere assignment? Who is the holder?

Problem 12. A note is payable to the order of Rice, who transfers it to Robinson without any indorsement. What is the position of Robinson?

Problem 13. A note payable to Michael McComb or order is indorsed, "Pay to Arthur Johnson for collection. MICHAEL MCCOMB." Johnson then indorses it, "Pay to Evans Glennon. ARTHUR JOHNSON." Glennon collects the money from the maker. Whose money is it?

Problem 14. A note payable to the order of Frank Munsick is indorsed, "Without recourse. FRANK MUNSICK" and transferred to Elbert. The maker is insolvent, and after due presentment to the maker and notice to Munsick, Elbert sues Munsick. Result?

119. Who is a holder in due course? State essentials. When is an instrument payable on demand overdue? What is bad faith? What is value? When is an antecedent debt value? What is notice of defenses or defects? State a case where a holder with notice is a holder in due course.

Problem 15. A note payable to order of Lodge on demand is transferred by him to Hill six months after it was first issued. Hill sues the maker, who sets up failure of consideration, a defense good against Lodge. Is it good against Hill?

120. What defenses are not good against a holder in due course? What are good? Illustrate. What presumption is there in favor of a holder? How is it overcome, and what then must the holder show?

Problem 16. Gholson in Des Moines gives Stein a note payable to his order for $100 upon Stein's false representation that he has worked two

months for Gholson upon the latter's Kansas farm. In fact Stein has never worked for Gholson at all. Stein at once indorses the note for value to Darling, who does not know the above facts. Is Gholson liable to Darling on the note?

Problem 17. Lasher borrows $100 of Frank and gives him a negotiable note for $100 at 6 per cent interest and also a bonus of $10. Frank before maturity transfers the note to Watt for value and without notice. Is Lasher liable to Watt on the note?

121. State the maker's contract. Is it absolute or conditional? When is presentment to the maker at maturity necessary? When not?

Problem 18. A note is payable "on demand at the Drover's State Bank." Is it necessary to present it at the Drover's State Bank before bringing an action against the maker?

122. What is the acceptor's contract? What does he admit? What is a general acceptance? What is a qualified acceptance? Must the holder take it? What is the result of taking it? What is the effect of naming a place of payment? of acceptance on separate paper? Must the holder take such acceptance? What is a letter of credit? Who may accept bills? State exceptions.

Problem 19. "To Albert Bames: Pay to the order of Fred Kelly one hundred dollars ten days after sight. Otis Lambert." Kelly indorses to Hiscock, who presents it to Bames. The latter writes, "Accepted, April 4, 1925. Albert Bames." Hiscock sues Bames. The latter sets up that Kelly forged Lambert's signature. Is this a good defense against Hiscock, who is a holder in due course?

Problem 20. The drawee accepts a bill as follows: "Payable when in funds. Curtis Blood." The holder presents it for payment at maturity, and the acceptor refuses to pay. Due notice is given the drawer. Is the acceptor liable to the holder? Is the drawer?

123. In what cases must a bill be presented for acceptance? When is it optional? What is the effect if drawee keeps and refuses to return the bill? On what days may presentment for acceptance be made? When is it excused? If drawee refused to accept, what should the holder do? What are the results if he does not take these steps? What are the results if the bill is accepted?

Problem 21. A bill payable ten days after sight is issued on January 8, 1925, is indorsed to Finnegan on February 6, and is presented to the drawee for acceptance on August 5. The drawee refuses to accept. Finnegan protests the bill and duly notifies the drawer. Is the drawer liable to Finnegan?

124. What is the drawer's contract? State the conditions. What is the effect of failure to fulfill them?

125. What is an indorser's contract as to payment? What warranties does he make? What is the order of the indorsers' liability? Who is an irregular indorser? What is his contract? Who is an accommodation indorser? Illustrate. Who is a guarantor? Is the guaranty negotiable?

126. When is a presentment for payment made? How is time computed? What is the effect if the due date falls on a holiday? on Saturday? When is an instrument payable on demand due? At what place must presentment for payment be made? State the mode of presentment. To whom is presentment made? What will excuse delay in presentment? When is it excused altogether? What is waiver? If the instrument is dishonored, what is the effect? What is payment for honor?

Problem 22. A note falls due on Saturday. The holder presents it to the maker on that day. It is not paid. The holder duly notifies the indorser. Is the indorser now liable to the holder?

Problem 23. A note is payable at "114 South Main Street, St. Louis." It is presented at another place of business of the maker in St. Louis, and on dishonor due notice is given to the indorser. Is the indorser's liability fixed?

127. By whom must notice of dishonor be given? Illustrate. What should the notice contain? Must it be written? If written, how may it be delivered? Within what time must it be given when the holder and the indorser live in the same place? when they live in different places? If an indorser receives notice, what may he do? To what place should notice be sent? What is waiver? When is notice excused? What is due diligence? What is the effect of failure to give due notice? Suppose a bill dishonored for nonacceptance and no notice given to drawer or prior indorser; are the drawer and indorser absolutely discharged?

Problem 24. A note made by Lockwood is indorsed by Perkins, Moak, Stevens, and Golden and is in the hands of Deyo. Deyo presents it to Lockwood and it is dishonored. Deyo gives due notice to Golden, who then gives due notice to Moak, and the latter to Perkins and Stevens. Who are liable to Deyo?

128. What is protest? By whom made? When is protest necessary? When allowable? What is the evidence of it? How must the certificate be made and what must it contain? What is noting? May the notary give notice? Who pays the cost of protest? What is reëxchange?

Problem 25.

PEORIA, ILLINOIS, January 1, 1925.

Two months after date pay to the order of Alex. Thompson one hundred dollars.

To JACOB FASSETT, Chicago. CARMET SITTA

Pay to George Hanson.
Alex. Thompson.

Waiving protest.
George Hanson.

Waiving notice.
John Kilmer.

Without recourse.
Lemuel Montague.

Pay to Paul Ritter
for collection.
Nathan Ottinger.

Paul Ritter now holds the bill at maturity (March 8, Sunday) for the owner, Ottinger. (1) State exactly what Paul Ritter should do as to presentment. (2) In case Fassett refuses to pay, state what Ritter should do in order fully to protect all the rights of Ottinger.

129. When should a check be presented? What is the result of delay? How should a check be sent by mail for collection? What is the effect if the holder has a check certified? if the drawer has it certified? May the holder of an uncertified check sue the bank? If a bank wrongfully dishonors a check, has the drawer any remedy?

Problem 26. A check drawn by Lomax on a Bristol (Vermont) bank and payable to Baxter's order is mailed to Baxter at Terre Haute, Indiana, and received there August 9. It is sent the same day to an Indianapolis bank for collection. On August 10 the Indianapolis bank mails it to its correspondent bank in New York City, where it is received on the eleventh. On the twelfth the New York bank mails it to its correspondent in Burlington, Vermont. The thirteenth is Sunday. The Burlington bank receives it on the fourteenth, and sends it at once to Bristol, but the Bristol bank had already suspended on the fourteenth. If sent direct, the check would have reached Bristol in forty-eight hours after it was mailed at Terre Haute or Indianapolis. Baxter sues Lomax on the check. Is Lomax liable for the whole amount?

130. When all the steps have been taken to fix an indorser's liability, what right has the holder against him? What are the indorser's rights if he pays?

PART IV. AGENCY: THE CONDUCT OF BUSINESS THROUGH REPRESENTATIVES

CHAPTER X

PRINCIPAL AND AGENT

131. Agency: its divisions and problems. Agency is a term meaning the legal relations established when one man is authorized to represent and act for another and does so represent and act for another. Most of the things that a man may do in person he may do through a representative. An individual often does, and a corporation necessarily must, employ persons to transact affairs and perform services necessary to the proper conduct of a business. A single concern often has hundreds and even thousands of such employees. In an era of large business enterprises like the present the subject of agency is one of the most important in the whole range of business law.

The acts which a representative may perform for his employer fall into two classes: (1) the making of contracts for the employer; (2) the doing of mechanical acts in the service of the employer. In order to bring out this distinction the subject is divided into two corresponding heads, the law of principal and agent and the law of master and servant. In the first there are three persons involved namely, the principal, the agent, and the third party with whom the agent brings the principal into a contract. In the second there are usually but two persons involved, namely, the master and the servant; but if in performing the required service the servant causes some injury to a third person, then three persons become involved.

In either of these two classes of cases the relation itself is generally created by contract. The employer promises to pay an

agreed compensation, and the employee engages to perform agreed services; but an employee (agent or servant) may act free of charge. So far as third parties are concerned, the important question is whether the agent or servant was authorized to act, not whether he was promised compensation for doing so. If the agent or servant was not authorized to act for the principal or master, the principal or master would not be liable for what was done unless the act was subsequently ratified. Authorization before the act is done or approval by the principal or master after the act is done is therefore the basis of a principal's or master's liability. The main problem of agency is to discover when and under what circumstances a man is liable for the acts of another person who represents him or assumes to represent him.

The problem is not an easy one. If an employer were liable only for the acts which he expressly authorizes or ratifies, there would be little difficulty. But the law may hold a principal liable for a contract which he never authorized, or which he even forbade, on the ground that he held his agent out to the world as authorized to make such contracts; in other words, it estops him from denying that an agent had the authority which he led others reasonably to suppose that such agent possessed. And it may hold a master liable for an act of a servant which was unauthorized or forbidden, on the ground that the act was performed in the course of the business intrusted to the servant and in the furtherance of it.

Examples. 1. Fry authorizes Bowstead to travel and sell goods for him as his agent, but forbids Bowstead to hire a horse on credit, furnishing Bowstead with funds for the purpose. Bowstead hires a horse on the credit of Fry while traveling about Fry's business. Fry is liable. The general power conferred to travel and sell goods carries with it, as to third persons, the incidental power to make a contract for the means necessary to this end. This cannot be limited by secret instructions to the agent.

2. Kline intrusts North with goods to sell, but forbids North to receive the payment. The buyer pays North, who leaves the country with the money. Kline cannot recover again from the buyer. An agent having possession of goods with power to sell them has implied authority to receive payment. But if the agent has not possession of the goods which he sells, he has no implied authority to receive payment.

3. Walker tells Triggs, his servant, to drive a load of goods to the railway station. Triggs drives negligently and injures Causer. Walker is liable because Triggs was about Walker's business.

4. As above. Causer is blocking the road. Triggs becomes angry and drives his wagon into and injures Causer's wagon. If Triggs does this to further Walker's business, that is, to get the goods sooner to the station, Walker is liable. If Triggs does it *solely* to vent his own spite, Walker is not liable. This is a question for the jury.

I. Appointment of Agents

132. Who may appoint agents. Generally speaking, a person who is able to make any contract is competent to appoint an agent by contract or ratification.

1. *Infants.* An infant's contracts are usually voidable at the choice of the infant; they are not absolutely void. It is sometimes said, however, that his appointment of an agent is absolutely void; but this rule is now generally confined to one form of appointment, namely, by a formal sealed document known as a power of attorney. The decided tendency of the courts is to hold the appointment of agents by infants, in any other form, to be voidable at the infant's election, like his other contracts. Thus an agency to sell the infant's horse would be voidable, while a power of attorney to sell and convey his lands would by most states, but not by all, be held void and of no effect. There seems to be no sound reason for such a distinction.

2. *Insane persons.* An insane person's appointment of an agent has generally been held void. (See section 16 *ante* for the capacity of insane persons generally.)

3. *Married women.* At common law a married woman could make no contracts for herself, and could not therefore appoint an agent. But under the modern married women's acts a married woman may generally contract as freely as an unmarried woman, and therefore she may make contracts appointing agents. Ordinarily a married woman may appoint her husband as her agent, but in a few states this is not allowed.

4. *Corporations.* Corporations can act only through agents. The directors are the chief agents, and they may appoint such

additional agents as are authorized by the charter or as are necessary to carry out the objects authorized by the charter (see section 167 *post*).

5. *Unincorporated associations.* Unincorporated associations, such as clubs and other societies, are not legal beings like corporations. If they appoint agents, the members are the principals so far as they authorized the appointment. Such authority given by the club members may be gathered from the constitution and by-laws to which each member assents, or may be found in a vote of a meeting at which members were actually present. If the constitution provides that a majority vote shall bind all members, assent to the constitution is assent to any action thus taken under the constitution. An agent or committee of a club may be personally liable when the other members are not.

Example. A college class voted to publish a book and elected Bunce business manager. Bunce contracted with Tarbox for the printing. All members of the class were present at the meeting except Godfrey. All are liable to Tarbox except Godfrey. If Dexter, who was present, had voted against the publication, the question whether he was also liable would be determined by a finding as to whether Dexter agreed to the decision of the majority.

6. *Partnerships.* In a partnership each member is both principal and agent. Each is liable as principal for the acts of the other partners within the scope of the partnership business, and each, by acting as agent for the partnership, may bind them. One of the implied powers of a partner is to appoint necessary agents. If rightfully appointed, an agent may by his acts bind the partnership.

7. *Subagency.* A principal, P, may empower an agent, A, to employ a subagent. If under such authority A appoints B as subagent, B becomes agent of P. If there is no authority to appoint a subagent, the agent must act personally in all matters involving judgment, skill, or discretion, but may delegate merely ministerial or mechanical duties to another. In such a case the subordinate is the agent not of the principal but of the agent, and the agent is liable to the principal for any default of the subagent.

Example. Gallagher employs Molton to sell some bonds. There is no implied authority given to Molton to employ Gardner (as a subagent) to

assist in procuring buyers, but Molton could get Gardner (as a servant) to carry bonds to and from the post office for him.

133. Who may be an agent. Any person may be an agent and be vested with authority to bind his principal. An infant, a married

Know All Men by these Presents:

That I, Levi P. Sawyer, *of the County of* Benton *State of* Iowa *do by these presents MAKE, CONSTITUTE and APPOINT* Jesse W. Dutcher, *of the County of* Polk *and State of* Iowa *my true and lawful attorney, for me, and in my place and stead* to sell and convey all my real estate in said County of Polk for a sum not less than twenty thousand dollars ($20,000) and to make and deliver all contracts and deeds necessary to effect such sale and conveyance.

Giving and Grant unto my Attorney full power and authority to do and perform all and every act and thing whatever required, and necessary to be done in and about the premises, as fully as I might or could do if personally present, reserving the right to revoke this Power at pleasure; and I hereby ratify and confirm all that my said Attorney may lawfully do in the said premises by virtue hereof.

IN WITNESS WHEREOF, I have hereunto set my hand this 11th *day of* September, *A. D. 19* 25

Levi P. Sawyer [L.S.]

STATE OF IOWA, Benton *County,* } *ss.*

BE IT REMEMBERED, That on this 11th *day of* September *A. D. 19* 25 *, before me personally appeared* Levi P. Sawyer, *to me known to be the identical person named in and who executed the foregoing instrument, and acknowledged that* he *executed the same as* his *voluntary act and deed.*

P. Barnes Winshurst
Notary Public in and for said County.

POWER OF ATTORNEY

woman, and probably a lunatic may be the instrumentality for bringing the principal into contractual relations with third parties. If the principal chooses and gives powers to an agent, he must be responsible for the results.

A principal may appoint two or more joint agents. Ordinarily joint agents must act together, and one cannot bind the others; but if a corporation is acting as agent, a majority of the directors may decide for all.

134. Form of appointment. Generally an agent may be appointed orally. To this there are two exceptions.

1. The Statute of Frauds in a few states requires that where a contract between P and C must be in writing and signed by P or his agent, the authority of the agent to sign shall also be in writing. As between the principal and agent a contract of agency which is not to be performed within one year must be in writing; but if an agent acted under an oral contract, the principal would, as to third persons, be bound by the agent's acts under this voidable oral contract.

2. Where the contract between the principal and a third person is required to be under seal (as in the case of a conveyance of lands), the authority of the agent to execute the contract must also be under seal. Such a formal authorization is commonly called a power of attorney. A power of attorney may be used in any case.

135. Ratification. Ratification consists in giving assent to an act done in one's name or on one's behalf either by a person who had no authority to represent one at all or by a person who, having some authority, went beyond his authority. When such unauthorized act comes to the attention of the person in whose name or on whose behalf it was done, he has a choice between consenting to the act or denying any liability for it. If he chooses to adopt it, this constitutes ratification, and he is in exactly the same situation as if he had originally authorized it.

Example 1. Caldwell, knowing that his friend Martin is on the lookout for a rare book, and seeing one at a bookshop, buys the book in Martin's name and on Martin's credit. When Martin learns of this he tells the bookseller to send him the book, but later, before receiving it, countermands the order. Martin has ratified and cannot afterward withdraw his assent. Martin's contract dates from the time of the sale to Caldwell, not from the time of ratification.

1. *Essentials of ratification.* The essentials of ratification are given below.

a. The contract must have been made in the name of and in behalf of an existing person known or capable of being found. If one contracts in the name of a corporation not yet formed, the corporation, when formed, cannot strictly ratify, although its assent may amount to the acceptance of an offer. So if Caldwell, intending to act without authority for Martin, makes a contract in his own name, Martin cannot ratify.

b. The one in whose name the contract was made must assent to it. Such assent may be implied, for example, by accepting benefits under the contract. Silence alone, where there is no duty to speak, is not sufficient evidence of assent; but where, for example, an agent who has some authority exceeds his authority, his principal's silence after full knowledge of the facts may amount to assent. The assent must be as to the whole act; the principal cannot ratify a part and disaffirm a part. If he takes the benefit, he must bear the burdens.

Example 2. Olds without any authority sold and delivered to Carson a load of coal belonging to Patterson. In delivering the coal he negligently broke Carson's window. Patterson sent Carson a bill for the coal. Patterson thereby ratified Olds's acts and became liable to Carson for damages for the broken window.

c. The principal must be of sound mind and legally of age. If he could have appointed an agent, he can ratify with the same results as if he had previously authorized (see section 132 *ante*).

2. *Ratification of forgery.* If A forges P's name to an instrument, like a promissory note, can P ratify the act? Upon this the cases differ. Some hold that P may ratify, because he could have authorized the signing of his name to the note; others hold that P cannot ratify, because A does not in fact assume to act for P in the case of a forgery, and that P's only motive in ratifying would be to conceal the crime of A. But all cases agree that P may be estopped to deny the validity of the signature where, after P acknowledges that the forged signature is valid, the instrument is taken by an innocent holder for value relying upon such acknowledgment.

3. *Legal effect of ratification.* Ratification relates back to the time of the formation of the contract or the doing of the act, and

the principal and the third person are in the same position as if the agent had in fact had full authority at that time.

For example, under the facts of Example 2, above, ratification puts the parties in the same position as if Olds had originally had authority to sell the coal to Carson.

4. *Effect of nonratification.* If the principal refuses to ratify, the agent is liable to the third party in damages for a breach of his implied warranty of authority. Every agent who makes a contract in the name of another guarantees that he has authority from that other to make the contract.

136. Agency by necessity. A wife has implied authority given her by the law to buy necessaries on her husband's credit. This exists independent of the will of the husband. But the one furnishing the goods to the wife has the burden of showing that they were in fact necessaries and that they were not otherwise provided to the wife.

An infant child has not, in England and in some of our states, any similar authority by law to pledge his father's credit for necessaries, but some states give him such implied authority. Often the father holds himself out as willing to pay bills contracted by the son. This is an agency created by the father's acts and not by law.

In some cases a seller of goods who has possession of the goods after the buyer has broken his contract has implied authority to sell the goods for the buyer and charge the buyer the difference between the contract price and the amount received upon the resale (see section 70 *ante*).

137. Termination of agency. An agency may be ended in various ways, some of which are as follows:

1. *By the parties.* The principal and the agent may agree to end their relation, or (with the exception noted in the next section) the principal may dismiss the agent, or the agent may quit the employment. If either principal or agent wrongfully ends an agency which was created by bilateral contract, he is liable to the other party for breach of contract. If the principal ends it, he should notify third persons with whom the agent has been accustomed to deal, or he may, as to those third persons, be estopped to deny the agency if the agent makes further contracts with them.

If the agent or servant wrongfully quits the employment before the contract term has expired, he cannot in most states recover any compensation for what he has already done; but a few states allow him to recover the value of such services, less the damages the principal or master has suffered from the breach.

2. *Death.* With the exception noted in the next section, the death of either party ends the agency. If, after the death of the principal, the agent, though ignorant of such death, makes a contract with a third party, also ignorant of such death, the contract binds no one. The dissolution of a corporation has the same effect as the death of an individual.

3. *Illness of agent.* The illness of an agent may create an impossibility of performance, which will terminate the agency. The illness of the principal would ordinarily have no effect.

4. *Insanity.* The insanity of either party would end the agency; but if the principal becomes insane, a person who deals with the agent in ignorance of such insanity, and before the principal has been judicially declared to be insane, is not allowed to be injured because of the principal's insanity.

5. *Impossibility.* If the subject matter of the agency is destroyed, the agency is of necessity ended. For example, an agency to sell a carload of wheat is ended if the wheat is destroyed by fire. If the agent is arrested and imprisoned, this, like illness or insanity, renders further performance by him impossible. If two agents are authorized to do the same act and one accomplishes it, the agency of the other is terminated.

138. Irrevocable agencies. The above rules are subject to the exception that if an agency be "a power coupled with an interest," the agency cannot be revoked or canceled. An agent has a power coupled with an interest when to his authority to act for his principal is added an interest in the subject matter of the agency itself, as distinguished from an interest in the compensation he is to receive for his services.

Examples. 1. Thomas pledges goods to Adams for a debt and gives Adams power to sell the goods upon default. Thomas cannot revoke this power, nor will it be revoked by Thomas's death or insanity. Adams has an interest in the subject matter (that is, the goods) to secure his debt.

2. Cushman sends goods to Markwick, a commission merchant, to sell for him, and requests Markwick to make an advance of a specified sum. Markwick does so. Cushman cannot revoke this agency, nor will the law revoke it. Markwick has an interest in it beyond the interest of acting as agent, because he is to get back the money he advanced from the proceeds of the sale. But the interest in the pay to be received alone does not constitute a power coupled with an interest.

II. Obligations of Principal and Agent to Each Other

139. Obligations of principal to agent. The obligations of the principal to the agent may be briefly stated under the heads of compensation, reimbursement, and indemnity.

1. *Duty to compensate agent.* The principal must pay to the agent the agreed compensation, if any, or a reasonable compensation where none has been agreed upon. If the principal ratifies an unauthorized act, the same duty to pay exists. If the principal wrongfully cancels the authority created by a bilateral contract of agency, the agent may sue for breach of the contract. His damages are presumed to be the entire compensation agreed upon, but the principal may show what the agent might have earned in a similar occupation during the unexpired term, and thus reduce the damages. An agent would not be justified in remaining idle after his discharge if he could by reasonable effort secure other and similar employment. If the agency is revoked by impossibility, the agent may recover the reasonable value of the services actually performed. If the agent abandons his contract of employment, he can recover no compensation in most states; but some permit him to recover the reasonable value less the damages sustained by the principal from the breach. An agent cannot recover compensation for illegal services, as for lobbying, betting, and the like.

2. *Duty to reimburse agent.* The principal must pay the agent back for all expenses necessarily incurred by the agent in the discharge of the agency, unless the agent's salary is intended to cover these expenses.

3. *Indemnity.* If an agent is compelled to pay damages because of his innocently following his employer's instructions, he is entitled to be protected and indemnified.

Example. Lansing directs Rogers to sell certain goods. Rogers does sell them. Powell afterward claims that the goods were his, sues Rogers for conversion, and recovers from Rogers their full value. Lansing must indemnify Rogers, that is, pay Rogers what he had to pay Powell. But if Rogers had known that the goods did not belong to Lansing, he could not recover indemnity.

140. Obligations of agent to principal. An agent owes to his principal the duties of obedience, prudence, skill, and good faith, and is also bound to render accounts. He cannot delegate his duties.

1. *Obedience.* The agent must follow his instructions faithfully. If he does not, and loss ensues, he must make it good.

Example 1. Leopold sends to August goods to be sold for cash. August sells them to Cornwall and takes Cornwall's check.

The check is dishonored and Cornwall leaves the state. August is liable to Leopold for the loss.

2. *Prudence and skill.* An agent is required to possess and to use the prudence, skill, and diligence necessary to the proper conduct of the business intrusted to him.

Examples. 2. Bigg sends Strong money to loan on security. Strong loans it on worthless securities which a prudent investor would not take. Strong is liable to Bigg for the loss.

3. Jay authorizes Conger to take out insurance on Jay's property. Conger takes a policy in a company which prudent men believe to be of doubtful financial condition. Loss ensues. Conger must make it good.

3. *Good faith.* The relation between principal and agent is a fiduciary one. The agent is bound to act with entire good faith toward his principal. He cannot act for both his principal and a third party. He cannot buy his principal's property, or sell his own to his principal without the principal's full knowledge.

Examples. 4. Ladd directs Long to buy a horse. Liffler directs Long to sell a horse. Long sells Liffler's horse to Ladd. Neither Ladd nor Liffler is bound. Long cannot act for both parties unless each knows that his agent is also acting for the other. Long can recover no compensation.

5. Dugan directs Lyman to buy a horse. Lyman sells Dugan his own horse. When Dugan discovers this, he may cancel the contract. Lyman cannot be both buyer and seller.

6. Francis works for Durk in the manufacture of a secret compound. Afterward Francis begins to manufacture the same compound. Durk may by court action prevent Francis from doing so. An agent or servant cannot disclose, or use for his own advantage, trade secrets learned while in the employment of another.

4. *Accounting.* The agent must keep and render accounts. He must keep his principal's money or goods separate from his own; if he mixes them and any loss results, the agent must bear it. He can make no secret profits out of his principal's business. He cannot, according to most courts, even keep moneys obtained for the principal in an illegal transaction.

Examples. 7. An agent deposits his principal's money in a bank in his own name. The bank fails. The agent must bear the loss. Had he deposited in his principal's name (Jones, by Allen, agent), the loss would have fallen on the principal if the agent acted prudently in selecting the bank.

8. Pinto directs Turner to purchase coal. The trade price is $5 a ton. Cathcart agrees that if the agent will purchase of him he will return to the agent 50 cents on each ton. Turner buys of Cathcart and Pinto pays Cathcart at the rate of $5 a ton. Cathcart gives Turner 50 cents on each ton. Pinto may compel Turner to pay over to him this money.

5. *Nondelegation of duties.* An agent cannot delegate or assign to another the exercise of any discretion or judgment unless his principal has authorized him to do so. He may delegate or assign the performance of merely mechanical duties, like the writing of contracts or other documents, but of course he is liable for the result. If he delegates, or transfers to another, discretionary duties without authority, he is liable for any loss. If the agent has authority to select subagents, he is liable only if he fails to use due care in selecting the subagents.

Examples. 9. Chaumont directs Arden to sell goods. Arden engages Horner to sell them and turns them over to Horner. Arden is liable to Chaumont for the value of the goods because he has misappropriated or converted the goods in delivering them to Horner to sell.

10. Bayne deposits a check in the Prudential Bank in Peoria, Illinois, for collection. The check is drawn upon a bank in Chicago, and the Prudential Bank sends it to the Continental Bank in Chicago for collection. The Continental Bank negligently fails to present it in due time, and loss results to

Bayne. Is the Prudential Bank liable to Bayne? Upon this courts differ. Some say Bayne impliedly authorizes the Prudential Bank to employ a subagent, and if the Prudential Bank uses due care in selecting the Continental Bank, it is not liable; other courts say Bayne contracts with the Prudential Bank alone and assumes no responsibility for the acts of those whom the Prudential Bank engages to assist in the collection. The real question is, Had the Prudential Bank authority from Bayne to appoint a subagent for Bayne?

6. *Del credere agent.* A *del credere* agent undertakes to guarantee the principal against loss from credits given by the agent to third persons in the course of the agency. In the United States it is generally held that the agent is liable primarily and not as a mere guarantor, and that therefore his promise need not be in writing. This agency is rather close to a sale by the principal to the agent and resale by the agent to third persons, but it differs in that the title to the goods remains in the principal until they are sold to third persons.

Example 11. Goodman agrees to act as agent for Guelich in selling hides and to guarantee to Guelich that he will suffer no loss because of sale on credit made by Goodman. Goodman is a *del credere* agent.

7. *Gratuitous agent.* If an agent promises to act free of charge, the promise is not enforceable; but if he does act free of charge, he is bound to act with care and prudence. It is generally said that such an agent is bound to use slight care and is liable only for gross negligence. The true standard is the care that reasonable men give under like circumstances. For example, bank directors serve free of charge; a board of directors is not bound to use as much care and vigilance as an individual banker gives to his own business, but must use the care which is ordinarily and reasonably given by such boards, as that is fixed by custom and experience (see section 75 *ante*).

III. Liability of Principal to Third Parties

141. General rules. The principal is liable upon all contracts made by his agent within the scope of the actual authority given to the agent.

The principal is also liable upon all contracts made by the agent

within the scope of the authority which appears to the general public to have been given to the agent.

The principal is not liable upon contracts made by his agent beyond the scope of the actual or apparent authority unless the principal ratifies such contracts.

Examples. 1. Sprague authorizes Cushing to sell goods, but at not less than market price and to responsible parties only. Cushing sells to Everson. Sprague seeks to escape the contract on the ground that Everson is not a responsible party and that Cushing sold Everson the goods at less than the market price. Sprague is bound by the sale. His instructions to his agent, not communicated to Everson, could not limit the apparent authority of the agent. Of course Cushing is liable to Sprague for any loss occasioned by his disobedience of instructions.

2. McCarthy authorizes Davy to sell goods. Davy trades McCarthy's goods for Duffield's horse and buggy. McCarthy is not bound. An authority to sell is not in any sense an authority to barter or trade.

3. White authorizes Cornell to buy goods on credit. Cornell buys goods of Sibley for White and gives Sibley a promissory note signed "White, by Cornell, agent." White is not bound. An authority to buy on credit is not an apparent authority to make negotiable paper. (*Problem:* What is Sibley's remedy upon this note? See section 135 *ante*.)

142. Agent's apparent authority. Apparent authority is that authority which a third party may reasonably expect from the circumstances of the agency. In determining whether an agent has apparent authority to do a particular act the following circumstances may be considered.

1. *Powers actually conferred.* The powers actually conferred may be the limit of powers real and apparent. This is particularly the case where the authority is contained in a formal sealed power of attorney. Such an instrument is construed strictly, and the third person is bound to examine it in order to decide the extent of the agent's authority. A power of attorney to sell lands in New York would confer no authority to sell lands in Massachusetts (see page 238). If the power is conferred in an instrument not under seal, or orally, the construction is more liberal; but in such a case the third person cannot claim to rely upon an apparent authority if he knows the exact terms of the actual authority.

2. *Powers incidental to those conferred.* With every actual authority goes the implied authority to use the means reasonably necessary to carry out the actual authority. An authority to sell and convey real property carries with it the power to make a deed containing the usual covenants of warranty and to receive the purchase money upon delivery of the deed. The authority to travel at the principal's expense in order to sell goods carries with it the power to hire a horse or use other reasonable means of travel.

3. *Powers annexed by custom.* The incidental powers of an agent may be enlarged by custom or usage. Some agents, like factors, brokers, and auctioneers, follow a calling where customs are of great importance, and naturally many usages and customs of the calling have grown up. One who employs such an agent is supposed to do so with knowledge of established usages and customs, and must be held to give to the agent all the authority customarily exercised by agents in that calling.

4. *Powers inferred from the conduct of the principal.* Over and above the actual, incidental, and customary powers of an agent there may be apparent powers gathered from the conduct of the principal. If a principal by his action leads third persons reasonably to suppose that he has given his agent certain powers, and the third persons act upon this appearance of authority, the principal will be estopped to deny that his agent did possess those powers. For example, if, after an agent has made a mortgage investment for his principal, the principal permits the agent to retain the bond and mortgage, he will be estopped to deny that the agent had authority to receive the interest or installments due upon the securities.

5. *General and special agents.* A general agent is one authorized to act for his principal in all matters relating to a particular business. A special agent is one (other than an agent following a customary calling) who is authorized to act for his principal in a single particular transaction. A principal impliedly confers larger powers upon a general agent than upon a special one. A third person should know that an agent engaged to do one special act is likely to have special instructions, and should inquire into the extent of the authority. In the case of the special agent the actual

authority is less likely to be enlarged by any of the considerations above stated; but even in such a case private instructions not known by the third person may not protect the principal.

Examples. 1. Law puts his grocery store in charge of Pehman as general manager, to buy and sell goods and transact the necessary business. Pehman exchanges sugar for eggs. This is within his implied powers.

2. Evans authorizes Odlum as a special agent to sell a barrel of sugar. Odlum exchanges the sugar for eggs. This is not within his implied powers.

143. Agents following calling where customs control. Some forms of agency are so well established and have been so long practiced that they have gathered a considerable body of customs which affect such agencies. A few of these will be briefly considered.

1. *Factors.* Factors or commission merchants are agents whose regular business it is to receive shipments of goods and sell them for a commission or percentage. The principal sending goods to a factor is bound by the customs of the calling. These customs have been adopted in order to protect innocent purchasers who are unable to know whose goods the factor is selling or what instructions the owner may have given. The factor may sell at any price, for cash or credit, may warrant the goods if such goods are customarily sold with a warranty, and may take negotiable instruments in a sale on credit. He cannot barter the goods. At common law the factor cannot pledge them for his own debt. In many states there are statutes, known as Factors' Acts, intended to protect the public dealing with factors, and providing in substance that one who buys or lends money upon the security of goods or documents of title in the hands of a factor, believing that the factor is the owner, shall be entitled to preference over the principal who has intrusted the goods or documents to the factor. The factor has a general lien (that is, a right of retention) upon the goods of his principal in his hands, or upon their proceeds for all sums due him from the principal for money advanced or obligations incurred by the factor while acting as such.

2. *Brokers.* Brokers are agents whose regular business it is to make contracts without having possession of the goods, or to negotiate for the purchase of property, or for loans, or for insur-

ance, and the like. A merchandise broker who sells goods has less apparent authority than a factor, because he has not possession of the goods. He cannot receive payment; he cannot usually warrant the goods; custom may permit a sale on credit, but the custom in this respect is not so broad as in the case of factors.

3. *Auctioneers.* Auctioneers are agents whose business it is to sell property publicly to the highest bidder. Until the fall of the hammer the auctioneer is the agent of the seller; after that he is also agent of the buyer, so as to enable the auctioneer to make the note or memorandum of the sale required by the Statute of Frauds. He must sell for cash, and not, unless specially authorized, on credit or for other goods or for negotiable paper. He may receive payment. He cannot warrant the goods unless specially authorized, nor can he rescind or cancel the sale when once made.

4. *Attorneys at law.* An attorney at law is an agent whose business it is, as a duly qualified officer of the court, to represent his principal or client in the conduct of lawsuits or other legal proceedings. He has implied authority to control the court proceedings, but he cannot compromise or release his client's claim or give up any important right of his client unless specially authorized. He may receive payment in full and give a release. He is bound to the highest good faith toward his client and is liable to the client for the careless management of the affairs intrusted to him.

5. *Bank cashiers.* A bank cashier is the chief executive officer of a bank. Tellers and other subordinate bank officers are under his control. He has power to draw checks or drafts upon the funds of the bank deposited with other banking or trust companies; to indorse and transfer for collection, discount, or sale the negotiable paper or other securities owned by the bank; to certify checks drawn upon the bank by depositors; to collect moneys due the bank; to borrow money and to lend money.

144. Undisclosed principal. An agent, in making a contract, may do so in his own name without stating to the third party that he is in fact acting for a principal. Factors usually make contracts in this way. In such cases the agent is always liable, but the principal may be also liable upon the contract. The principal may enforce such a contract against the third party.

1. *General rule.* Subject to some exceptions, an undisclosed principal is liable to third parties with whom an authorized agent has dealt within the scope of the agency, in the same way and to the same extent as a disclosed principal, although the third person supposed he was dealing with the agent as principal.

The rule works both ways. An undisclosed principal may claim the benefits of a contract made by his agent in the course of the agency.

Examples. 1. A business is conducted in the name of Eaton, who buys goods of Jackson. Later Jackson discovers that Farley owns the business. Eaton has been apparently acting for himself alone, but actually acting as agent for the undisclosed principal, Farley. Jackson may recover the price of the goods from Farley.

2. A business is conducted in the name of Benson, who sells goods to Tucker. In fact Benson has been agent for his undisclosed principal, Whitney. The owner, Whitney, may recover the price of the goods from Tucker.

2. *Exceptions.* To these rules about undisclosed principals there are some exceptions, and a few of them may be noted.

a. If the principal or the third party has in good faith settled his account with the agent, he is no longer liable.

Examples. 3. If Gilman conducts Simmons's business in Gilman's name and buys goods of Ray, and Gilman and Simmons have a settlement in which Simmons pays Gilman for these goods, Ray cannot afterward sue Simmons.

4. If under like circumstances Gilman sells goods to Ray, and Ray has paid Gilman or otherwise settled with him, Simmons cannot afterward sue Ray.

b. In contracts under seal only the parties named in the contract can sue or be sued, and hence an undisclosed principal could neither sue nor be sued upon such a contract.

Example 5. A sealed instrument is signed "Adolph Ludwig, Byron King, Cassius Calker, Trustees of the First Baptist Church." The church is not liable. The instrument should be signed "The First Baptist Church, by Adolph Ludwig, Byron King, Cassius Calker, Trustees." Had this been a simple contract (not under seal), the church could have been sued upon it.

c. In negotiable instruments, only the party named as maker, drawer, or indorser can be sued. Hence, if an agent signs such an

instrument in his own name, he alone is liable upon it. So also only the payee can sue, even though he was an agent for an undisclosed principal; but this part of the rule is not important, since the payee, by indorsing the instrument, could confer upon the undisclosed principal or any other person the right to sue.

Example 6. Free buys goods for Dana without disclosing his agency for Dana, and gives a promissory note to Hamblen's order, signed "Free, agent." Hamblen cannot sue Dana upon this note. The word "agent" has no more effect than if Free had signed "Free, shoemaker," or "Free, Republican." These are mere words of description. Free alone is liable. Had this been a nonnegotiable instrument, Dana could have been sued upon it.

d. If, after discovering the principal, the third party clearly chooses to hold the agent, he cannot afterward proceed against the principal. The third person has a choice to hold the agent to the contract made in the agent's name, or to disregard the agent and proceed against the principal. But he cannot do both. He must choose, and his choice, once made, is binding upon him.

145. Frauds by agent. If in the course of an authorized negotiation for the principal an agent makes unauthorized false representations, amounting to fraud or deceit, concerning the subject matter of a contract, the principal is liable in the same way as if he had made them personally (see section 30 *ante*).

If the agent commits a fraud for his own benefit and not for his principal's, but by means of property or papers intrusted to him by his principal, the principal may be liable.

Examples. 1. A stock transfer agent of a corporation fraudulently issues stock certificates and sells them for his own benefit. In many American states the corporation is held liable.

2. An agent, authorized by a railway company to receive goods and issue bills of lading, fraudulently issues bills of lading for wheat where no wheat is received, and sells the bills of lading to innocent buyers. In some states the railway[1] is liable, but England and some of our states[2] hold otherwise.

[1] As, for example, Alabama, Kansas, Maine, Nebraska, New York, Oregon, Pennsylvania, Tennessee.

[2] As, for example, Arkansas, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, North Carolina, Ohio, Oregon, Washington.

IV. Liability of Agent to Third Parties

146. Where agent alone is liable. If an agent goes beyond his authority, so that his principal is not bound, the agent is liable to the third party for the breach of his warranty of authority. He is not liable on the contract itself when that was made in the principal's name. The agent is liable for any fraud, deceit, or other tort committed by him while about the principal's business.

If an agent contracts for an imaginary principal, he is liable upon the contract himself.

If an agent signs a sealed instrument or a negotiable instrument in his own name, or in his name with merely descriptive words (like agent, attorney, etc.) after it, he alone is liable unless the body of the instrument shows by its language that it is the principal's promise.

Example. "We, as trustees of the Mt. Calvary Church, promise to pay to the order of Guy Harriss one hundred dollars. Agnes Fawke, Carney Hawkins, Boley Smith, Trustees of the Mt. Calvary Church." This binds the Mt. Calvary Church. But if it had read, "We promise to pay etc.," and had been signed in the same way, the church would not have been liable (see section 144, 2, *b*, *ante*).

147. Where both principal and agent are bound. In a contract made by an agent for an undisclosed principal both are bound; that is, the third party may choose which one he will hold. Even a written contract (other than a sealed or negotiable one) signed by the agent alone may be shown by oral evidence to be in fact intended to be the contract of an undisclosed principal.

REVIEW QUESTIONS AND PROBLEMS

131. What is the meaning of agency? Into what two branches does the subject fall? Explain each. How is the relation created? What is the problem as to third persons? Why is it difficult? Why is or is not the principal or master liable in each example given?

132. May an infant appoint an agent? Is the appointment voidable? Is it void? Same questions as to an insane person? a married woman? If one contracts in behalf of an unincorporated club, who is bound? Is a member bound who is present and votes against the making of the contract?

May one partner bind another by appointing an agent? May an agent, by appointing a subagent, bind his principal?

Problem 1. An infant Downey authorizes an agent Finucane by power of attorney to sell and convey Downey's real property. Finucane sells and conveys Downey's property. When Downey comes of age, can he ratify this sale and conveyance, or, in order to make it valid, must he then make a new deed? What of an infant's authority to an agent to sell a horse? to buy one?

Problem 2. Haskell when sane authorizes Barnes to buy goods for him. Haskell becomes insane, and Barnes afterward purchases of Mackey, who does not know of Haskell's insanity. Is Haskell bound?

133. Who may be an agent? How must joint agents act? Exception?

134. When must an agent's appointment be in writing? When must it be under seal? Draw a power of attorney to collect debts and give receipts for the same.

135. What is ratification? What are the essentials? If in Example 1 Caldwell had bought the book in his own name, could Martin ratify? Is silence ratification? Can one ratify a forgery of his name to an instrument? How can one be estopped in such a case? If one ratifies, from what time does the contract obligation date? If one refuses to ratify, what are the third party's rights?

Problem 3. Carroll is the promoter of an intended corporation. He makes a contract for it. When it is duly chartered, the corporation ratifies the contract. Is it liable for a later breach of the contract?

Problem 4. Bergen without authority makes a contract in his own name, but intending it for the benefit of Chisholm. When Chisholm hears of it, he ratifies it. Is Chisholm bound?

Problem 5. Burr without authority conveyed Hamilton's land to Farragut. Hamilton received the purchase money. Farragut claims that this was a ratification. Is it so?

136. What is a wife's implied authority as agent? an infant child's? an unpaid seller's?

137. How may an agency be ended by act of the parties? If a principal ends it, what are the rights of the agent? of third parties? If the agent ends it before the contract expires, what may he recover for services already rendered? What is the effect of the death of either party? of illness? What is the effect of impossibility?

Problem 6. Vance authorized Thurston to sell his lands. Later he also authorized Clark to sell them. On September 9 Thurston sold them to Swan. On September 10 Clark sold them to Morgan. Vance conveyed to Swan, and Morgan sues Vance for breach of contract. Result?

Problem 7. Roby authorizes Kelley to receive payments of Olson. Roby dies. Olson pays Kelley, neither knowing of Roby's death. Is the payment binding upon Roby's estate?

138. What is an irrevocable agency? What is a power coupled with an interest? Illustrate.

Problem 8. Woodward borrowed $2000 of Hall and gave the latter a power to collect certain rents and pay himself from the proceeds. Woodward died. Was the agency to collect the rents ended? Suppose a tenant had paid rent to Hall after Woodward's death?

139. What are the obligations of the principal to the agent? What are an agent's damages when the principal wrongfully revokes or cancels the agency? When an agency is revoked by impossibility or by the death of the principal, how much may an agent recover? What is reimbursement? What is indemnity?

Problem 9. Hassler agrees to work for Veach for a year at $200 a month. At the end of four months Hassler quits the employment without cause. How much may Hassler recover of Veach?

Problem 10. In a similar case Veach discharges Hassler without cause at the end of four months. How much may Hassler recover?

140. What are the agent's duties? Illustrate each. If an agent acts for his principal and also for a third person, what is the result? If an agent makes a secret profit, what is the result? May an agent delegate his duties? Explain and illustrate. What is a *del credere* agency? How does it differ from a sale? What are the obligations of an agent who acts free of charge?

Problem 11. Fiske directs French, his agent, to pay taxes on Fiske's land. French neglects to do so. The lands are sold for taxes. French bids them in and takes a tax deed. Is it good against Fiske?

Problem 12. Audrey sold for Donnelly certain prize packages which it was illegal to sell, and received the money for them. Donnelly sues Audrey for the money. Audrey sets up the illegality. Result?

Problem 13. McClain authorizes Pollock to accept bills of exchange drawn on McClain. When a bill comes in, Pollock decides to accept it and tells Graham, a clerk, to write the acceptance. Graham writes, "Accepted, McClain, by Graham." Is McClain bound? How would it be if Pollock had told Graham to use his judgment and accept bills, and Graham had accepted this?

141. State the rules as to a principal's liability to third persons for the acts of his agent. Illustrate.

142. How is an agent's apparent authority determined? What is actual authority and how determined? What are incidental powers? Illustrate. What are customary powers? What are powers arising from the conduct

of the principal? Illustrate. What is the distinction between general and special agents? Illustrate.

Problem 14. Goldschmidt gives Aaron general authority to sell goods. Aaron sells them to Levy and warrants them. Is Goldschmidt bound by the warranty?

Problem 15. McCoy directs Corbett to lend money and take a note and mortgage. Corbett does so. The note and mortgage remain in Corbett's hands. The borrower pays Corbett. Is McCoy bound by this payment?

Problem 16. Haines authorizes Hornby to make collections. Lavery gives Hornby a check payable to the order of Haines. Hornby indorses the check in Haines's name, obtains the money, and runs away. Does the loss fall upon Haines or on the bank?

143. Define factor. Explain his powers. What are the Factors' Acts? Define broker. Distinguish from factor. Define auctioneer. Whose agent is he? Define attorney at law and state some of his powers. State the powers of a bank cashier.

Problem 17. A broker is authorized by Cook to sell goods and sells them to Erway. Cook delivers the goods to Erway. The broker then collects the price from Erway and runs away. Cook sues Erway for the price. Can he recover?

Problem 18. Tullis authorized an auctioneer to sell his farm for $500 cash down, balance of the price bid in thirty days. These terms were publicly stated at the time of the auction. The auctioneer sold to Hart for $3000, and took Hart's check for the $500. Hart had no funds in bank to meet the check, but two days later deposited funds and the check was paid to the auctioneer. Meanwhile Tullis had learned of the transaction and repudiated the sale. Hart now sues Tullis for breach of contract. Result?

144. What is an undisclosed principal? State the general rule as to the liability of an undisclosed principal. State the general rule as to his rights. State the exceptions and illustrate each.

Problem 19. Hay owns a hotel. He conducts it in the name of Moore, and it is supposed that Moore is the proprietor. Bristol sells cigars on credit to Moore for the hotel. Hay has forbidden Moore to buy cigars on credit. Is Hay liable to Bristol for the cigars?

Problem 20. In the above case, Hay, after learning that Moore bought on credit, settled with the agent, paying him in full for the cost of the cigars. Can Bristol then recover of Hay?

Problem 21. In the above case (Problem 19) Bristol, after learning that Hay is the true principal, sues Moore and obtains a judgment against him. This remains unpaid and he then sues Hay. Can he maintain this action?

Problem 22. In the above case (Problem 19) Bristol warranted the cigars. They turned out to be inferior to the warranty. Can Hay recover against Bristol for breach of the warranty?

Problem 23. In the above case (Problem 22) the agent, before Bristol knows that Hay is the true principal, settles with Bristol for the breach of warranty. Can Hay now sue Bristol?

145. Is the principal liable for the frauds of the agent committed for the principal's benefit? for the agent's benefit? Illustrate.

Problem 24. Dodge authorizes Dahl to sell his land. Dahl sells to Curran and fraudulently represents the land to be well timbered and well watered. When Curran discovers the fraud, he sues Dodge, who has received the purchase money without knowing of his agent's fraud. Is Dodge liable to Curran in this action for deceit?

146. How is an agent liable to the third person upon an unauthorized contract? How is he liable if he deals in the name of an imaginary principal? How is he liable if he signs in his own name a sealed or negotiable instrument?

Problem 25. Atlee authorizes Groves to issue insurance. Groves without authority represents to Fried that he may keep petroleum upon the insured premises. Fried's premises burn. Atlee successfully defends an action upon the policy because Fried kept petroleum. Fried sues Groves for breach of his warranty of authority to make such representation. Result?

147. Who are liable on an authorized written or oral contract made by an agent in his own name?

CHAPTER XI

MASTER AND SERVANT

I. Injuries to Third Persons

148. Negligent torts by servants. If in the conduct of his master's business a servant negligently injures a third person (other than a fellow servant), the master is liable to the injured person; the servant is of course also liable, because everyone is liable for his own torts. But if the injury is due to some contributing negligence of the third person, the third person cannot recover from either the master or the servant.

Examples. 1. A railway engineer negligently runs over Greene at a railway crossing. The railway company is liable to Greene. The engineer also is liable.

2. A workman negligently allows a brick to fall from a building into the street. It strikes and injures Armitage. The employer of the negligent workman is liable to Armitage. The workman also is liable.

3. A servant at a hotel negligently spills soup upon a guest's dress. The hotel keeper is liable for the damage. The servant also is liable.

4. Whiteley negligently fails to look and listen at a railway crossing. The engineer negligently fails to sound a signal. Whiteley is struck and injured by the locomotive. He cannot recover, because of his contributory negligence.

149. Willful torts by servants. A master is liable for torts intentionally committed by his servant in the course of the employment and in the supposed furtherance thereof. If the servant is acting for the master and supposes, however mistakenly, that his act will be to the master's interest, the master is liable.

Examples. 1. Willcox's vehicle obstructs the Rochester Street Railway Company's track. Simmons is motorman on one of its cars. Simmons orders Willcox to get off the track. There is a dispute and Simmons purposely drives his car against Willcox's vehicle and damages it. The railway company is liable if Simmons did this in order to get a clear track and make his schedule time. Simmons also is liable for his own tort.

2. Sweetser sells tickets for the Chicago Elevated Railway. Zender buys a ticket and lays down a bill. Sweetser gives Zender the change and then mistakenly thinks the bill is counterfeit and has Zender arrested. The railway company is liable for false imprisonment if Sweetser did this in order to get good money for the ticket; but if Sweetser did it to serve the public and punish a supposed criminal, the railway company is not liable. In either case Sweetser is personally liable.

A public carrier of passengers is liable for any injury intentionally done to a passenger by one of its employees, whether done in the supposed performance of a duty or out of personal malice. The carrier owes a very high duty to passengers.

Example 3. A street-car conductor sees one of his enemies on the street car and strikes him to pay off an old grudge. The street-car company is liable. The conductor is of course also personally liable.

II. Injuries to Servants

150. Injury to one servant by another. The master was not at common law liable to one servant for an injury occasioned by the negligence of a fellow servant. This is called the fellow-servant rule and has been very largely done away with by statute (see section 153 *post*). The master is liable for an injury occasioned by the negligence of a vice principal.

A vice principal is one who is charged by the master with the performance of any of these duties: (1) providing a safe place to work; (2) providing safe tools; (3) providing a sufficient number of competent servants; (4) providing suitable rules and regulations to govern the service; (5) providing inspection and repair of instrumentalities; (6) providing special warning of any extraordinary danger. If one charged with performing any of these duties is negligent in the performance thereof, and an employee is injured in consequence of such negligence, the master is liable. The master does not insure safety in these respects; he insures that due care will be taken.

A fellow servant is one who performs work in operating the machinery or appliances of his master. If in operating machinery or in any similar act one fellow servant injures another, at common

law the master is not liable. It is said that a servant, in entering the employment, assumes the risk as to the negligence of his fellow servants.

Examples. 1. Sawdon and Tomaselli are both employed by Mossert. Sawdon is told to repair a machine and does so negligently. The machine breaks down while Tomaselli is operating it, and injures Tomaselli. Mossert is liable to Tomaselli even at common law. In repairing the machine Sawdon was a vice principal.

2. Owing to the carelessness of Sawdon in operating a machine Tomaselli is injured. Mossert is not liable to Tomaselli at common law. In operating the machine Sawdon is a fellow servant of Tomaselli.

3. Owing to the negligence of a railway engineer a train is derailed and a brakeman injured. The railway company is not liable to the brakeman. An engineer is a fellow servant of a brakeman; so also is a conductor; so also is a switchman. But a train dispatcher is a vice principal.

151. The master's nonassignable duties. At common law the duty to use care to furnish safe machinery, safe tools, proper inspection, and the like, as specified in section 150, is called a nonassignable duty, because, no matter who is directed to perform it, the master remains liable to his servants for any negligence in the performance of that duty.

This rule is qualified by the further common-law rule that if a servant, with full knowledge of some defect or danger, remains at work, he assumes the risk as to the defect or danger and cannot recover from the master if he is injured because of this particular danger or defect.

Example 1. Simpson is told to operate a machine. He knows it does not work safely. He operates it and is injured because of this defect. He cannot recover at common law.

But if the master promises to repair the defect, the servant may remain at work a reasonable time without assuming the risk.

Example 2. As above. Simpson objects to the machine because it is defective. The master promises to repair it. The next day Simpson is injured. The master is liable to Simpson even at common law.

In any case at common law a servant cannot recover if his injury is due to his own contributory negligence, that is, if his own carelessness either wholly or partly caused the injury.

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Example 3. Simpson, after the master's promise to repair, operates the machine. He is injured by his own negligence in the manner of operating it. He cannot recover at common law.

152. The Federal Employers' Liability Act. The Federal Employers' Liability Act (in force since 1908) provides rules governing the liability of common carriers by railroad, engaged in foreign or interstate commerce, to their employees for injuries and to the representatives of deceased employees for causing the death of such employees. In order that the employee, or his representative in case of the employee's death, may have the benefit of the act, the employee must have been, when injured or killed, engaged in interstate or foreign commerce. The railroad is rendered liable by this act for the negligence of all its officers, agents, and employees. Thus, the old common-law rule that an employer was not liable for the negligence of a fellow servant of the deceased or injured person is abolished so far as these employers and employees are concerned.

The act also makes a sweeping change in that it abolishes the common-law rule of contributory negligence, as far as these employers and employees are concerned, and substitutes therefor the so-called rule of comparative negligence. Thus, the carelessness of such a railroad employee does not bar him from recovery, provided the carelessness of another railroad employee contributed to the injury. The effect of the injured party's own carelessness is merely to reduce the amount of his recovery. If he has suffered $1000 damages and half of it was caused by his own carelessness, he is not barred of all recovery as he would have been at common law, but recovers only half of his actual damages, namely, $500. Furthermore, if the railroad was disobeying a statute passed for the protection of the employee, the carelessness of the injured or killed employee will not reduce the recovery by the employee or his representative.

The act also provides that an employee of such a carrier does not assume the risk of any dangers of the employment which are brought about by a failure on the part of the railroad to comply with the Federal Safety Appliance Act, which provides for safe equipment on interstate and foreign railroads. This is a partial

abolition of the common-law rule that the servant assumed all risks with which he was familiar. He still assumes risks which do not come from the violation of this safety-device act.

This important Federal law also makes void contracts by an employee of such railroads whereby he agrees not to hold the railroad liable for its negligence. But a railroad can set off against any liability under the act contributions which it has made to any relief or insurance fund which has been used to bring compensation to the injured employee or his family.

Examples. 1. Booth, a track repairer engaged in repairing the track of the Big Four Railroad at Cleveland, Ohio, was injured by the carelessness of a fellow track repairer. Neither of these men ever went out of the state of Ohio in their work. The railroad runs through several states, and the track being repaired at the time of the injury to Booth was used by trains running from Ohio to Indiana. Booth was engaged in interstate commerce and may take advantage of the Federal Employers' Liability Act. It is not necessary that an employee's work should take him into different states. The fact that the workman whose carelessness caused the injury to Booth was a fellow servant, doing the same kind of work, is of no importance under this statute.

2. Whitman, a conductor on the Lehigh Valley Railroad, running on a train which went through New York, New Jersey, and Pennsylvania, was killed partly because of the carelessness of a brakeman on the same train and partly because of his (Whitman's) own negligence in failing to watch where he was stepping. In an action by Whitman's administrator to recover damages for his death, the jury should be instructed to find what part of the blame was Whitman's and what part the brakeman's. If they find that each was equally to blame, then the damages suffered by Whitman's family should be divided by two and the railroad held liable for that sum.

3. Pederson, a switchman, working for the Chicago & Alton Railroad, at East St. Louis, Illinois, has as a part of his work switching cars taken out of freight trains running from Illinois into Missouri. Owing to the failure of the railroad to supply the coupling device which is prescribed by the Federal Safety Appliance Act, Pederson is injured. The fact that he knew of the defective coupling device before the injury and continued in his work does not show an assumption of the risk, because the Federal Employers' Liability Act provides that the workman does not assume risks arising out of violations of statutes by the railroad.

153. Workmen's compensation laws. All the states except six[1] have enacted, since 1911, workmen's compensation acts which pro-

[1] Arkansas, Florida, Mississippi, Missouri, North Carolina, and South Carolina.

vide compensation to workmen when they are injured in the course of their employment, and to their families when the workmen are killed at work, regardless of the cause of the injury or death, unless the cause was the intentional act of the workman himself or in some cases his drunkenness or gross carelessness. The theory of these laws is that losses to the workmen or their families coming about in the ordinary course of their employment ought to be borne by the employer and be charged up by him to the cost of production, instead of being borne by the workmen or their families. The common law gave the employee and his family protection only at the end of expensive and long-continued litigation, during which rather technical rules of law tended to bar the workman of any recovery.

The workmen's compensation acts vary greatly in the several states.[1] It is impossible here to give the details of all the state laws. These laws sometimes apply to all industries, sometimes to all work except agricultural and domestic service, and in some states only to men working in dangerous industries, like the building trades. The Federal Workmen's Compensation Act has application to all civil employees of the Federal government.

The acts also differ as to whether the employer is obliged to be subjected to the rules of the act or may choose between the Workmen's Compensation Act and his common-law liability. These two classes of laws are called the compulsory and elective workmen's compensation acts.

The workmen's compensation acts very generally do away with or greatly modify the common-law defenses of contributory negligence, the fellow-servant rule, and assumption of risk. In many states if the employer does not see fit to accept the Workmen's Compensation Act and pay the workman or his family for injuries or death at the rates fixed therein, but rather compels the workman or his family to go into court and establish a common-law liability, then the employer is forbidden to set up the three common-law defenses named above.

[1] *Bulletins Nos. 272* and *330* of the United States Bureau of Labor Statistics, which give the texts of the state workmen's compensation acts, can be obtained from that bureau or may be seen in any large library.

If employer and employee are under a workmen's compensation act, and the employee is injured or killed, the injured man or his representative notifies the employer of the accident within a limited period. If the employer does not pay what the employee or his representative thinks is due under the Workmen's Compensation Act, the employee or his representative brings a proceeding before the state Compensation or Industrial Commission to claim the award to which in his opinion the law entitles him. The commission then hears the evidence about the accident, the extent of the injury and the disability of the injured man, and his earning capacity. An award is then made by the commission, which may usually be reviewed by either employer or employee in the courts. The employee is not eligible for compensation unless his disability continues for a period of some appreciable length, the time ranging from six days to three weeks. The amount which the employee is entitled to obtain for any given injury is fixed by these statutes. The sums vary greatly, but are usually a certain proportion of the employee's weekly salary for a given period.

In most states the employer is required by the Workmen's Compensation Act to take out insurance against claims made by his workmen under the Workmen's Compensation Act or is required to prove to the state commission his financial ability to pay all claims which may justly be made against him under the act. The insurance fund is sometimes run wholly by the state, but more generally by a private insurance company. As a matter of practice almost all large employers of labor take out workmen's compensation insurance, whether compelled by law to do so or not.

Examples. 1. Jameson is employed by Warren in an orange grove at Pomona, California, and is injured by the fall of a ladder. While a workmen's compensation act is in force in California, it does not apply to agricultural and domestic workers unless both employer and employee in such work have consented to its application.

2. Walker works in a factory in Galesburg, Illinois, and receives a blow on the head by the falling of a board. The injury compels him to be absent from work six days only. Although there is a workmen's compensation act in Illinois, Walker is not entitled to compensation under it because his injury did not disable him long enough. There must be more than six days of disability.

3. Vincent is injured in a store in Ottumwa, Iowa, by falling down an unlighted stairway. The Iowa Workmen's Compensation Act is elective, that is, the employer is not obliged to be subjected to it; but it applies unless the storekeeper has elected not to come under the act. If the storekeeper has filed a statement indicating that he does not wish to become bound under the act, Vincent will have to sue the employer in the courts under the common law, but the act provides that in such case the employer shall not be allowed to set up contributory negligence, the fellow-servant rule, or assumption of risk.

4. Bordwell has his hand caught in a machine in a factory at Taunton, Massachusetts, in which he is working. He is partially disabled. The Massachusetts act provides that the Industrial Accident Board may award him his medical and hospital expense for the first two weeks after his injury, and also two thirds of his wage loss, but not more than $16 a week and not more than a total of $4000.

5. Wyckoff is injured in a mill in Mansfield, Ohio, through the breaking of a machine. It does not appear that the injury was caused by the negligence of anyone. The cause of the accident is wholly unknown. This makes no difference under the workmen's compensation acts. The workman does not have to show negligence by his employer in order to have a claim under these acts.

6. Brownell is a builder at Troy, New York, and inquires of you whether under the New York Workmen's Compensation Act he must carry insurance. He must insure against claims either in the state insurance fund or in an authorized private company, unless he furnishes satisfactory evidence to the Workmen's Compensation Commission that he is able without insurance to pay all awards which may be made against him under the act.

REVIEW QUESTIONS AND PROBLEMS

148. When is a master liable for negligent injuries by his servant to a third person? What will bar the action?

149. When is a master liable for willful injuries inflicted by his servant upon a third person? What is the rule as to public carriers?

Problem 1. Blakeman, a boy of twelve, steals a ride on a freight train. The brakeman discovers him and pushes him off while the train is in motion, and the boy is injured. Is the railway company liable?

Problem 2. Brodie is employed to repair electric lights in McQuade's building. While he is on a stepladder McQuade's janitor, who is sweeping the room, pushes the ladder intentionally and Brodie falls and is injured. Is McQuade liable?

150. Who is a vice principal? Who is a fellow servant? Is a superior officer a vice principal? What is the usual test at common law as to the master's liability to one employee for a negligent injury by another employee?

Problem 3. Owing to the negligence of a switchman a train is derailed and the engineer injured. Is the railway company liable at common law to its engineer for the negligence of its switchman?

Problem 4. Vlaski was a laborer in Shipman's factory. Freeman was superintendent of the factory. Vlaski was lifting a flywheel of an engine off from its center, when Freeman negligently turned on the steam and started the wheel, injuring Vlaski. Is Shipman liable to Vlaski at common law? under the workmen's compensation acts?

Problem 5. A workman in the Frisco Railway Company's repair shops repairs a locomotive boiler negligently. When it is used it explodes and injures an engineer. Is the railway company liable at common law? under the workmen's compensation or employers' liability acts?

151. What are the master's nonassignable duties? How may the risk as to these be shifted to the employee? What is the effect of a promise to repair a defect? What is the effect of contributory negligence?

Problem 6. Patron was Mitzger's domestic servant, and Mitzger agreed to furnish board and lodging. The roof over Patron's room leaked. Mitzger promised to repair the roof. Patron stayed and, owing to the leak, took cold and was ill. Is Mitzger liable to Patron at common law? under your workmen's compensation act? Does the claimant have to show negligence by the employer? What is the effect of these laws on the common-law defenses of contributory negligence, the fellow-servant rule, and assumption of risk?

152. What is the Federal Employers' Liability Act? To what employers and employees does it apply? What is its effect on the common-law rules about contributory negligence, fellow servants, and assumed risks? What is the rule of comparative negligence?

153. What are the workmen's compensation laws? Is one in force in your state? When is such a law elective? When compulsory? What are the rights of a workman under such a law when he is injured? Are all industries included within these laws? What are the insurance systems provided by some statutes?

PART V. BUSINESS ASSOCIATIONS

CHAPTER XII

PARTNERSHIPS AND JOINT-STOCK COMPANIES

154. Forms of conducting business. Business may be conducted by a sole trader, or by a partnership, or by a joint-stock company, or by a corporation.

A sole proprietor or trader is one who conducts his business in person or through agents, without admitting anyone else to share in the profits. He alone owns the property used in the business; he alone has a voice in the management of the business; and he alone is liable for the debts of the business. He may, of course, have agents to whom he intrusts many important matters, but they are his employees and are responsible to him alone.

It is the combination of persons in business that calls for special consideration.

1. *Partnerships.* In order to increase capital and make it possible to do a larger business, two or more persons may combine and do business together as one firm. A partnership involves a high degree of confidence in the ability, fidelity, and integrity of one's partners, because a partner's acts create personal liabilities against the other partners. Membership in a partnership does not relieve one of personal liability to third persons for contract obligations and torts of the partnership. The partnership has three important characteristics: (1) the death or retirement of one partner dissolves the firm; (2) each partner is an agent for the firm; (3) each partner is individually liable for the debts of the firm.

2. *Joint-stock companies.* The joint-stock company is a large partnership in which the interests are represented by shares of stock, as in a corporation. It differs from a partnership in that the death or retirement of a shareholder does not dissolve the com-

pany and in that a shareholder is not an agent of the company unless duly elected or appointed as such. It is like a partnership in that each member is individually liable for the debts of the company.

3. *Corporations.* A corporation is a distinct legal being or creature independent of its stockholders. Partnerships and joint-stock companies are formed by the agreement of the members and require no permission of the state for their formation. A corporation is a creature of statute and is by statute given a legal existence and clothed with legal powers as a separate being or creature. Title to property vests in the corporation, not in its members; it acts through its agents as a legal person; it is liable for its debts and torts, and no liability for such debts or torts (unless expressly fixed by statute) rests upon the stockholders in the corporation. The last feature is highly important. Persons may invest money in a corporation without becoming individually liable for the debts of the corporation, while in a partnership or joint-stock company each partner or shareholder is individually liable for all the debts of the firm.

Statutes, of course, may and often do change these results. Thus, we have full-liability corporations authorized in some states, while we also have limited partnerships in some. In the full-liability corporation each shareholder is individually liable, while in the limited partnership a limited partner is not individually liable beyond a specified amount. In some corporations the statutes make shareholders individually liable to a certain amount, as twice the value of the stock owned. The usual corporation debt, however, imposes no liability on the stockholders.

I. Partnerships

155. What constitutes a partnership. A partnership may be general or limited, and partners may be real or ostensible (apparent), active or dormant (silent, inactive).

1. *General partnerships.* A general partnership is an association of two or more persons under an agreement to carry on in common, as if they were one person, a business or occupation, and to share as common owners the profits of the enterprise. A partnership agreement need not be in writing. It usually is in writing,

however, and the document is called the Articles of Partnership (see page 277 *post*).

The mere sharing of profits is not a sure test of the existence of a partnership, although it is strong evidence of it; an agreement to share both profits and losses is still stronger evidence. It is often difficult to decide whether or not a particular agreement creates a partnership. In general it may be said that there must be a common interest and control in carrying on a business by which each is usually agent for the others and under which there is a division of profits and losses.

The Uniform Partnership Act, now in force in sixteen jurisdictions,[1] states the better principles of the common law on the subject. It settles doubt and conflict on many perplexing questions.

Examples. 1. Feldman and Braunstein agree to carry packages for hire. Feldman is to furnish horse and cart and to give his services. Feldman is to receive a fixed sum. They are to divide the expenses and to share the profits over and above Feldman's fixed salary. This is a partnership. They are carrying on a business in common, with a view to profits. One partner may in such case be paid specially for services.

2. An owner of a farm lets it on shares under an agreement to take one half the products of the farm as rent. This is not a partnership, but a lease, with an uncertain rental.

3. A manufacturer engages an agent to sell goods, agreeing to give him one third of the net profits on any sales made by him. This is not a partnership, but an agency. The agent does not carry on, in common with the manufacturer, the business of making and selling the goods.

4. Morris furnishes capital to start a retail store. McCoy puts in his services in managing the business. They agree to share the profits. This is a partnership. They carry on a business in common, with a view to profits.

5. Waters and Newman each put in services to carry on in common a law practice, with a view to profits which they are to share. This is a partnership.

2. *Ostensible or apparent partner.* If a man holds himself out as a partner or permits others to hold him out as a partner,

[1] Alaska, Idaho, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Wisconsin, and Wyoming.

when in fact he is not, he becomes liable as partner to third persons who deal with the supposed firm relying upon this appearance of partnership.

Examples. 6. Tupper and Van Zandt dissolve partnership. Tupper allows his name to remain over the door of the store and upon the letterheads used in the business. Oppenheim sells goods to the supposed firm, believing Tupper to be still a partner. Oppenheim may hold Tupper liable for the price of the goods. Tupper is estopped by his conduct to deny that he is a partner. He should give notice to former customers of his withdrawal from the partnership.

7. Grimley introduced Long to Acker as the moneyed partner. Long was not a partner, but he did not deny Grimley's statement. Acker trusted to this representation and lent to the firm money which was never repaid. Long is liable. He is estopped to deny that he was a partner. "If a man won't speak when he should, he shan't when he would."

3. *Dormant or silent partner.* A dormant partner is one who is actually a partner but is unknown to the business world as a partner. He occupies much the same position as an undisclosed principal. He is liable on the firm contracts when the fact that he is a partner is discovered, and he is entitled as a partner to the benefit of the firm contracts.

4. *Limited partnerships.* These exist only when allowed by state statute.[1] They are partnerships in which one or more of the partners are not liable for partnership debts beyond the sum each has contributed to the capital. Such partnerships must have at least one general partner whose liability for the firm debts is unlimited. The general partners manage the business, sharing the profits with the limited partners. The statutes prescribe how such a partnership may be formed, and the statutes must be strictly followed; any violation of them will make the concern a general partnership. The theory is that it is a general partnership except so far as the statute, duly complied with, makes it a limited partnership.

[1] There are statutes in a majority of the American states, and a Uniform Limited Partnership Act is in force in Alaska, Idaho, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, Tennessee, Utah, Virginia, and Wisconsin.

5. *Who may be a partner.* Any person who can make contracts may become a party to a partnership contract. By modern statutes married women may make contracts and hence may become partners, although some states do not permit a married woman to become a partner with her husband. Infants may become partners, but the contract may be set aside at the will of the infant. So far, however, as an infant has actually put his property into a partnership, he cannot withdraw it to the injury of creditors. A corporation cannot become a partner unless permitted to do so by its charter.

156. Rights and duties of partners as to each other. Each partner is bound to exercise toward his associates in the partnership the highest good faith. He can make no secret profits.

Examples. 1. Mullen and Deming are partners in a grocery. Mullen also individually runs a separate sugar business. Mullen without Deming's knowledge sells sugar to the firm at a profit. Mullen must share this profit with Deming.

2. Sayre, Reed, and Peake as partners are renting a store. When the lease expires Sayre renews it in his own name and for his own benefit. Sayre is held a trustee of this lease for the benefit of the partnership.

Each partner is bound, unless otherwise agreed, to use due diligence in carrying on the business, and can claim no pay except his share of the profits. But if one partner intentionally neglects the business and throws all the work upon another, the active partner may be allowed compensation, at the discretion of a court, upon a final accounting and settlement of the business.

Each partner may claim the right to take part in the business, and each is entitled to have the business conducted according to the terms of the partnership agreement. No change can be made in the nature of the business, and no new partner can be admitted, without the consent of each partner; but as to the unimportant matters a majority of the partners may rule.

If the partnership is for a fixed time, a withdrawal of one partner before the end of the time, without the consent of the others, is a breach of contract for which they may recover damages. If the partnership is to last only as long as all partners wish, a partner

may retire at any time. One partner cannot be expelled by the others. If a partner sells his interest, the buyer gets only the seller's share of such property as remains after the firm creditors are paid and the partnership is wound up.

Each partner is entitled to an accounting or settlement as to the firm profits. No action at law can ordinarily be maintained by one partner against the others, but an accounting in a court of equity may be had by one partner against the others. If one has paid more than his share of expenses, he is entitled to have the other partners repay him.

157. Powers of partners. Each partner is an agent for the others in the conduct of firm business, and the partnership is bound by any contract made by a partner within the scope of his authority. So wide are the powers of each partner that one ought not to form a partnership with another unless he has the utmost confidence in that other's honesty and judgment. The following are some of the powers possessed by a partner in a mercantile partnership.

1. To sell or mortgage any personal property belonging to the firm, and even to dispose of the entire stock at one sale; but not to sell real property, because the conveyance must be by all the partners or by one partner authorized by power of attorney from the others; and no partner has power to transfer firm property in payment of his individual debt.

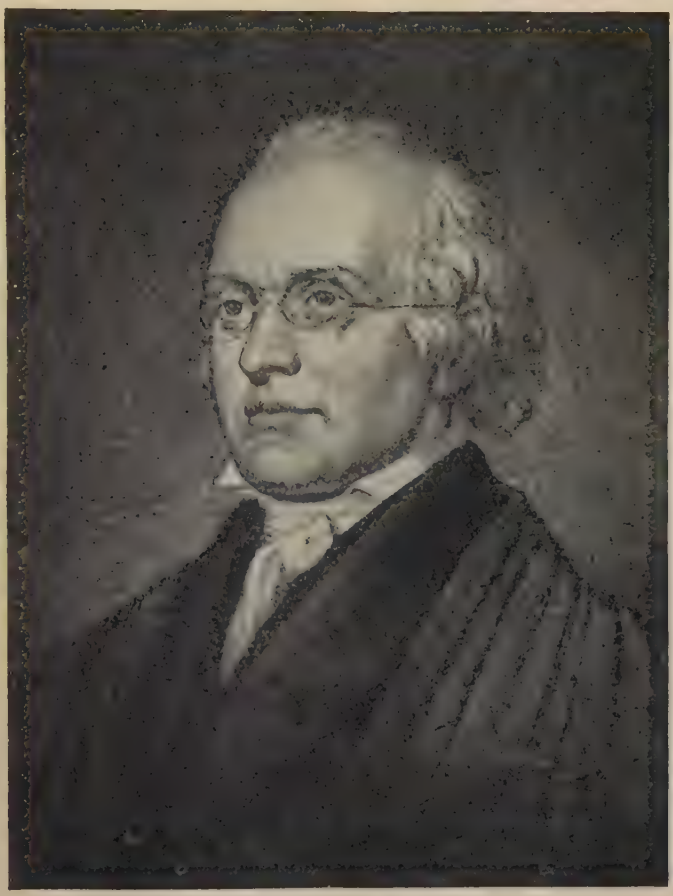
2. To purchase any goods dealt in by the firm or usually employed in such business, but not other or different goods; a grocery partnership would not carry any power to one partner to purchase shoes.

3. To receive payment of debts due the firm and give receipts.

4. To make, accept, and indorse negotiable instruments in the name of a trading firm, that is, a firm that buys or sells; but in a nontrading partnership, as a law firm, a hotel firm, or a mining firm, a partner does not possess this implied power.

5. To borrow money on the credit of a trading firm and give security by pledge or mortgage upon the firm property, except in the case of a nontrading firm.

6. To engage agents and servants for the conduct of the business.



JOSEPH STORY (1779–1845)

A Massachusetts lawyer who was appointed to the Supreme Court of the United States at thirty-two. His decisions in commercial law had a great influence in the development of American law. He lectured at Harvard and wrote valuable textbooks on bailments, bills and notes, partnership, agency, equity, and other subjects

The following are some of the powers which a partner may not exercise without the consent of his copartners.

1. To bind the firm by deed.

2. To bind the firm by a guaranty of his own or another's debt.

3. To bind the firm by a submission to arbitration or by a confession of judgment.

4. To assign the entire firm property to pay the firm debts unless the other partners cannot be reached and the matter is urgent.

After the dissolution of a firm some powers remain in each partner for the purpose of winding up its affairs. A partner may still sell property and receive and pay debts. He cannot make new contracts or issue negotiable instruments, although he may indorse an instrument "without recourse" in order to sell or collect it.

158. Liabilities of partners. The obligations of a partnership are the joint obligations of its members; that is, actions to enforce them are brought against all jointly. But although the creditor brings an action for his debt against all the members of the partnership jointly, and judgment is entered against them jointly, he may satisfy his judgment out of the individual property of one partner, and is not bound to collect from the joint-partnership property. If creditors do exhaust the partnership property, they may then go against the individual property of the partners to make up any sum still due. A partner who thus satisfies a firm debt out of his property is entitled to have a proportionate share repaid to him by his fellow partners.

A partner who goes out of a firm remains liable to creditors for debts contracted while he was a partner, unless the creditors release him. An incoming partner is not liable for debts contracted before he became a member of the firm, unless he assumes and agrees to pay them.

Partners are liable for torts like deceit or negligence committed by a copartner or a servant in the course of the firm business. Such liability is joint and several; that is, the action may be against all the partners jointly or against one partner or against several.

159. Rights and remedies of creditors. A partner may be liable to creditors of the firm of which he is a member and also have debts to his individual creditors. He has partnership property and

also separate property. The problem arises as to the rights of the two classes of creditors in the two classes of property.

1. *Firm creditors.* Firm creditors have a right to have the partnership property applied first to the payment of the partnership debts. An individual creditor of a partner cannot collect out of the partner's interest in the partnership to the injury of the partnership creditors. After the firm creditors are paid, the separate creditors of a partner are entitled to any part of the partnership property belonging to him.

Examples. 1. Darby and Klock, partners in a grocery, purchase flour of Byers, and Darby purchases a watch of Lord. Lord obtains judgment against Darby for the watch, and tries to collect out of Darby's interest in the partnership. Byers afterward obtains judgment against Darby and Klock for the flour, and tries to collect out of the partnership property. Lord's claim is not good as against Byers's. Lord can obtain any interest remaining in Darby after Byers's judgment is satisfied.

2. In payment for the watch Darby turns over to Lord a horse and wagon belonging to the firm. If Lord knew this was firm property, he cannot hold it against firm creditors. If he took it believing it to be Darby's, the courts differ as to whether the firm creditors can recover Darby's interest in it.

2. *Separate creditors.* Most courts hold that the separate creditors of a partner are entitled to be paid first out of his separate estate. After the separate creditors are paid, the partnership creditors are entitled to the surplus of the partner's individual property.

Examples. 3. Howell and Everett, partners, are insolvent. They owe Blood $15,000. The partnership property is valued at $10,000. Howell's separate property is valued at $6000, and he owes Bayne $4000. Everett has no separate property. Bayne will be paid in full out of Howell's separate property. Blood will get the $10,000 of partnership property and the surplus of $2000 from Howell's separate estate after Bayne's debt has been paid.

4. As above. Howell and Everett owe Blood $7000. Howell owes Bayne $14,000. Blood will be paid in full out of the partnership property. Bayne will get the $6000 from Howell's separate estate and Howell's portion of the surplus of $3000 from the partnership property after Blood is paid in full.

These rules may be thus stated: The partnership estate is applied to the payment of partnership debts, and the separate estate to the payment of separate debts, any surplus from either estate

being carried over to the other if necessary. But this applies only when there are partnership assets; if there are no partnership assets, the firm creditors share the individual property of the partners equally with the individual creditors.

160. Dissolution. A partnership may be dissolved because of the happening of any of the following events:

1. By the withdrawal of a partner. If the term for which the partnership is to continue is indefinite, a partner may withdraw whenever he desires. If the partnership is for a definite period, the withdrawal of a partner before the end of the period subjects him to an action for damages, but the partnership is dissolved.

2. The sale of a partner's interest works a dissolution, but the remaining partner may form a new partnership with the purchaser.

3. The bankruptcy of a partner works a dissolution unless otherwise agreed.

4. The bankruptcy of a firm works a dissolution.

5. The death of a partner works a dissolution unless otherwise agreed. Title to partnership property remains in the surviving partners for the purpose of winding up the partnership. They must first pay the firm debts and then distribute the remainder, accounting to the estate of the deceased partner for his share. The survivors alone sue or are sued upon firm accounts; but if the firm assets are insufficient to pay the firm debts, the firm creditors may make claims against the estate of the deceased partner as well as against the individual property of the survivors.

6. If the partners are subjects and residents of different countries, and their respective countries declare war against each other, this works a dissolution of the partnership.

7. A court may decree a dissolution of the firm for the misconduct or insanity of a partner or upon a showing that the business is carried on at a loss.

Upon the dissolution of a firm there should be notice to third persons, in order that each partner may be protected against further contracts made in the firm name. Special notice should be given to those accustomed to deal with the firm, and general notice, by publication in a newspaper, to the public at large. Existing creditors must be paid before the firm assets are divided.

Surviving partners have power to wind up the affairs of a partnership after dissolution. The representatives of a deceased partner, or an assignee of a bankrupt partner, cannot interfere except to protect the rights of the deceased or bankrupt partner.

The property may be sold if necessary when there is a dissolution. The good will is property that should be sold if it has money value; the purchaser of the good will gets the right to carry on the business under the old name, with himself named as successor to that business.

Upon the dissolution of a partnership, if there is a loss, it must be paid first out of accumulated profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits. If there is a gain, the assets should be used first in paying the debts and liabilities of the firm to persons who are not partners therein; secondly, in paying to each partner what is due to him from the firm for loans as distinguished from capital; thirdly, in paying to each partner proportionately what is due from the firm to him because of the capital he has invested; fourthly, anything left should be divided among the partners in the proportion in which profits are divided.

II. Joint-Stock Companies

161. How distinguished from ordinary partnerships. Joint-stock companies are large partnerships in which the capital is divided into shares and each partner gets a certain number of shares representing his investment. Such partnerships are legal at common law, but they have very generally been regulated by statutes.

These companies differ from ordinary partnerships in the following respects:

1. They are not dissolved by the same causes. The shares are transferable. If a shareholder dies, his shares pass to his estate; if he becomes bankrupt, his shares pass to his assignee in bankruptcy; if he sells his shares, the transferee succeeds to his rights. There may be the withdrawal of partners and the introduction of new partners without a dissolution of the joint-stock company.

2. The shareholders do not all participate in the management, but elect directors or other officers who conduct the business. Members who are not officers have no authority to bind the company. The articles of association usually control this.

162. How like ordinary partnerships. Joint-stock companies are like ordinary partnerships in the following respects:

1. Each member is personally liable for the debts and contracts of the company. If he sells his shares he remains liable for debts contracted while he owned them.

2. Unless otherwise provided by statute, all the members must join in an action by the company, and as many as the creditor wishes to hold responsible must be joined in an action against the company. By statute in some states such a joint-stock company may sue or be sued in the name of its president, treasurer, or other officer representing all the members.

PARTNERSHIP AGREEMENT

ARTICLES OF AGREEMENT, made the first day of May, one thousand nine hundred and twenty-five, between George Rice, of the city of Cincinnati, county of Hamilton, state of Ohio, and Alfred Post, of the same place,

WITNESSETH, as follows:

I. The said parties above named have agreed to become partners in business, and by these presents do agree to be partners together under and by the name or firm of Rice and Post, at the said city of Cincinnati, in the dry goods business, buying and selling all sorts of goods, wares, and merchandise to the said business belonging. The partnership to commence on the first day of June, 1925, and to continue ten years.

II. To that end and purpose the said George Rice has contributed the sum of five thousand dollars ($5000) in cash, and the said Alfred Post has contributed the lease of the store at 110 Main Street, in the said city of Cincinnati, to be occupied by them, and the stock of goods and good will of the business there heretofore carried on by him, which are together estimated and valued by the parties at the like sum of five thousand dollars ($5000), the capital stock so formed to be used and employed in common between them, for the support and management of the said business, to their mutual benefit and advantage.

III. At all times during the continuance of their partnership they and each of them will give their attendance, and to the utmost of their skill and power exert themselves for their joint interest, profit, benefit, and advantage, and buy, sell, and merchandise with their joint stock, and the increase

thereof, in the business aforesaid. And they shall and will at all times during the said partnership bear, pay, and discharge equally between them all rents and other expenses that may be required for the support and management of the said business; and all gains, profit, and increase that shall come, grow, or arise from or by means of their said business shall be divided equally between them on the first day of June, September, December, and March, in each year during the continuance of said partnership; and all loss that shall happen to their said business by bad goods, bad debts, or otherwise, shall be borne and paid between them equally.

IV. And at the end of their partnership the said partners, each to the other, shall and will make a true, just, and final account of all things relating to their said business, and in all things truly adjust the same; and all stock, as well as the gains and increase thereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts, or otherwise, shall be divided between them.

In Witness Whereof, the parties hereto have hereunto interchangeably set their hands, the day and year first above written.

In the presence of GEORGE RICE
WARREN JONES ALFRED POST

REVIEW QUESTIONS AND PROBLEMS

154. What is the object of forming a partnership? What are its chief characteristics? Distinguish a joint-stock company from a partnership. What is the advantage of forming a corporation?

155. Define partnership. How would you decide whether or not a particular agreement constitutes a partnership? What is an ostensible partner? a dormant partner? What are limited partnerships? Who may be a partner?

Problem 1. Meigs loaned a firm (Noble and Grand) $2000 to be used in the business, on an agreement that he was to have one third of the profits. Collinwood sold goods to the firm. Collinwood sues Meigs as a partner along with Noble and Grand. Is Meigs liable to Collinwood?

Problem 2. In the above case Meigs is to receive 6 per cent interest in any case, and 15 per cent of the profits in addition. Is Meigs liable as a partner?

Problem 3. Dennis Mahoney has carried on business in his own name, and Hartwell has dealt with him. Mahoney sells out to Arter and Bridewell, who continue the business under the name Dennis Mahoney & Company. They order goods of Hartwell in that name and Hartwell supplies them. Hartwell does not know that Dennis Mahoney has gone out of the business. Dennis Mahoney knows the business is carried on under the name of Dennis Mahoney & Company. Is Dennis Mahoney liable to Hartwell?

Problem 4. Michie is a dormant partner in the firm of West and Thompson. Hawkins does not know this. He sells goods to West and Thompson. Michie afterward withdraws. Hawkins then sells more goods to West and Thompson. (1) Is Michie liable on the first sale? (2) Is he liable on the second?

156. State the duties of a partner toward his fellow partners. State his rights. Can one partner claim extra compensation? Can one partner withdraw? Can one sue the other at law?

Problem 5. Buck, Lynn, and Carver agree to enter into partnership, and Buck is intrusted with the purchase of a horse. He buys one for $200, but charges it to the firm at $300. In an action for an accounting, Lynn and Carver seek to recover from Buck $100 as firm money. Result?

Problem 6. Van Vleck and Burdick are partners, and each is to give his services to the firm business. Van Vleck becomes ill, and all the work devolves upon Burdick. May Burdick claim compensation for this extra labor?

Problem 7. In the above case Van Vleck neglects the business willfully and refuses to perform any services. Burdick is compelled to manage the whole business alone. May Burdick claim extra compensation?

157. What are a partner's powers? Can he sell real property, and why? Can he make negotiable instruments? Can he borrow money? Can he exercise any powers after the dissolution of the firm?

Problem 8. Peck and Gillett are partners and owe Vaughn $650. Peck gives Vaughn a mortgage in the firm name on the personal property of the firm to secure this debt. Is this binding on Gillett or on the firm Peck and Gillett?

Problem 9. Peck gave the above mortgage to secure his individual debt. Does this bind Gillett?

Problem 10. Hyman and Oldendorf are partners in the conducting of a theater. Hyman borrows money for the business and gives a promissory note in the firm name. Is Oldendorf bound?

158. State the liabilities of a partner. How is an action brought on a debt against a firm? How is a judgment satisfied? What is contribution? Is an incoming partner liable for debts contracted before he became a member of a firm? How may an action for tort be brought against a firm?

159. State the rules as to the relative rights of creditors of the partnership and creditors of a partner.

Problem 11. Abend, Durant, and Cohalan are equal partners. The partnership property is worth $10,000. Abend has $5000 individually, Durant

$4000, and Cohalan no assets. The partnership debts amount to $12,000. Abend's debts amount to $3000, Durant's to $6000, and Cohalan's to $2000. How will these sums be divided among the firm and individual creditors?

Problem 12. Same problem if firm debts were only $8000.

160. How is a partnership dissolved? What should be done after dissolution? What interest have the representatives of a deceased partner in a partnership of which the deceased was a member? What is done with a surplus after firm debts are paid?

161. How do joint-stock companies differ from partnerships?

162. How do they resemble partnerships?

CHAPTER XIII

CORPORATIONS

163. Definition and classification. A corporation is an artificial creature or being created by statute law and given many of the legal capacities of individuals, as the power to take, hold, and convey property, make contracts, sue and be sued, and the like.

It is a legal being distinct from its stockholders, individually or collectively. It may, for example, sue a stockholder or be sued by a stockholder. It may sue any person without joining its stockholders. The title to property vests in the corporation and not in its stockholders. Were all the stockholders to unite in one deed, they could not convey the property of the corporation. It is, within its charter powers, regarded for all purposes as an artificial person,—a distinct member of the business community.

Public corporations are political beings created for governmental purposes, as counties, cities, and the like.

Private corporations are created for the promotion of some interest in which their members are concerned. These fall into two main classes: stock corporations, which are for private financial gain, and membership, or nonstock, corporations, which are for a variety of purposes, as clubs, charitable societies, educational institutions, and the like.

Stock, or business, corporations are those with which we are concerned. They are intended to enable a number of persons to unite their capital in one enterprise, with two important results: first, the power to transfer their shares to other holders without affecting the business; and, second, a freedom on the part of the stockholders from any personal liability for the debts, contracts, or torts of the corporation. A partnership accomplishes neither of these results. A joint-stock company accomplishes the first but not the second.

A *Massachusetts*, or *business*, trust is a business carried on through the medium of trustees instead of by a corporation or partnership. The persons desiring to start the business convey the property which is to be used in the business to trustees, and the trustees issue certificates to the persons who have put property into the business. These certificates correspond to shares of stock in a corporation. The trustees correspond to the directors of the corporation, and manage the business and declare and pay dividends to the holders of the trust certificates. This scheme was invented in Massachusetts to avoid restrictions on the holding of land by corporations. Since this trust business organization is not a corporation, it avoids some taxation and regulation which the states have imposed on corporations.

164. How a corporation is formed. A corporation is created by permission of a legislature. Some corporations are created by a special statute which creates the corporation and defines its powers, but state constitutions now very generally prohibit the legislatures from chartering private business corporations by special act. Business corporations are now usually created under a general statute which permits a number of persons to form a corporation by preparing and filing with some public official a document known as articles of incorporation. The certificate contains the name of the corporation, its object, the amount of capital stock, the number of shares into which the capital stock is divided, the place where its principal business office is to be located, the length of life of the corporation (usually perpetual), the number of its directors, with the names and addresses of those who are to serve at the outset, and in some states the names and addresses of the subscribers to the stock, with the amount subscribed. Often the statute requires that a specified number of the incorporators shall be citizens of the United States, and a specified number citizens of the state under whose statute the certificate is filed. Some statutes require that the name of an officer or agent upon whom legal process may be served shall also be stated in the certificate.

The statute under which a certificate is made and the certificate itself together constitute the charter of the corporation and define and limit its powers.

In selecting a name for a corporation it is necessary to consult the state official (usually the Secretary of State) who keeps a record of names previously taken by corporations within the state. A name once adopted by one corporation cannot be used by another in the same state, even though the second corporation is to engage in a different business. Even if the name which it is desired to use is not exactly like that of an existing corporation, but merely resembles it, the name would not be a desirable one to adopt, because of the possibility that the old corporation might charge the new one with attempting to deceive the public into believing that the new and old corporations were the same. Such deception might be called unfair competition and result in an injunction against the use of the corporate name by the new corporation.

The laws of some of the states are much more lenient than those of other states with respect to fees charged for incorporation, taxes on corporations, regulation of corporations, etc. Often persons desiring to incorporate will do so under the laws of these favorable states (for example, Delaware and New Jersey), even though the business is to be carried on in a far distant state. But if residents of Nebraska incorporate under the laws of Delaware, for the purpose of doing business in Nebraska, the corporation will be a foreign corporation in Nebraska, will have to receive permission from the state to do business there, and be subject to some regulation and taxation. The choice of a state in which to incorporate in order to carry on a given business is a question which should be intrusted to a skilled lawyer.

EXAMPLE OF CERTIFICATE OF INCORPORATION

We, the undersigned, all being persons of full age, and at least two thirds being citizens of the United States, and at least one of us a resident of the state of New York, desiring to form a stock corporation, pursuant to the provisions of the Business Corporation Law of the state of New York, do hereby make, sign, acknowledge, and file this certificate for that purpose, as follows:

First. The name of the proposed corporation is *The Cayuga Manufacturing Company.*

Second. The purposes for which it is to be formed are to manufacture, sell, and trade in agricultural implements and machinery.

Third. The amount of capital stock is one hundred thousand dollars.

Fourth. The number of shares of which the capital stock shall consist is one thousand of the par value of $100 each, and the amount of capital with which said corporation will begin business is twenty thousand dollars.

Fifth. The principal business office is to be located in the city of New York, in the county of New York, state of New York.

Sixth. Its duration shall be fifty years.

Seventh. The number of its directors is to be five.

Eighth. The names and post-office addresses of the directors until the first annual meeting are as follows:

[Here insert five names and addresses.]

At least one of these directors is a citizen of the United States and a resident of the state of New York.

Ninth. The names and post-office addresses of the subscribers, and a statement of the number of shares of stock which each member agrees to take in the corporation, are as follows:

[Here insert names, addresses, and amounts subscribed.]

In Witness Whereof, we have signed, acknowledged, and filed this certificate in duplicate.

Dated this 10th day of January, 1925.

John Doe
Richard Roe
Henry Fenn
John S. Dale
Wm. Blackheath

State of New York }
County of New York } ss.

On the 10th day of January, 1925, before me personally appeared John Doe, Richard Roe, Henry Fenn, John S. Dale, and Wm. Blackheath, to me personally known to be the persons described in and who made and signed the foregoing certificate, and severally duly acknowledged to me that they had made, signed, and executed the same for the purposes therein set forth.

George Redbank, *Notary Public*

[This is filed and recorded in the office of the Secretary of State, and a certified copy or duplicate original is filed and recorded in the office of the register of New York County. Fees are required for filing and recording. An organization tax must also be paid to the State Treasurer.]

165. Members or stockholders. The members of a business corporation are those who hold its shares of stock; they are called stockholders or shareholders. The relation of stockholders to a

corporation and to each other is contractual. At the outset individuals subscribe for shares of stock, that is, agree to take them when issued, and thereby agree to associate themselves as stockholders according to the provisions of the charter and the terms of the subscription. They also agree to pay for the stock when issued or when payment may be called for. When a stockholder has fully

FORM OF STOCK CERTIFICATE

paid for his stock, he is under no further liability to the corporation unless the stock is by statute or contract made subject to assessments to be levied on the stock by the directors.

When a stock certificate has been issued, the owner may transfer it and the transferee becomes a stockholder. The Uniform Stock Transfer Act, now in force in seventeen jurisdictions,[1] governs the method of stock transfer and the rights of transferor and transferee. According to this act the transfer of the stock is completed by indorsement of the certificate in blank or to a specified person or by the execution and delivery of a separate instrument assigning

[1] Alaska, Arkansas, Connecticut, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, and Wisconsin.

the certificate or giving a power to assign it, coupled with a delivery of the certificate. The registration of the new holder's name on the books of the corporation is not necessary to the complete transfer of the stock under this act. It is usual to indorse on the certificate of stock a power of attorney to the new holder to make the transfer. When a certificate is so indorsed with the name of the transferee left blank, the certificate may pass from hand to hand until some holder chooses to insert his name and have the transfer made to him on the books. Stock certificates do not generally have the characteristics of negotiable paper, but under the Uniform Stock Transfer Act they have been given a full negotiability, that is, even a thief or a finder of a certificate in negotiable form may give good title to it. Infants and others not competent to contract may become transferees and holders of stock in a corporation.

A stock certificate is the written evidence issued by the corporation that the person named in it is registered on the books of the company as the owner of a specified number of its shares of capital stock, each of a certain par value.

In many states there have now been adopted so-called blue-sky laws. These statutes provide for state commissions to supervise the issuance of stocks and bonds by corporations. Each corporation desiring to put out a new issue of stock or bonds must submit to the commission proof that its property and business justify the issuance of the stock or bonds, so that the purchasers of such stock or bonds will not be deceived and lose money. These laws are intended to protect the public against worthless stocks and bonds, issued without adequate security behind them.

166. Directors. In a corporation the members (stockholders) are not, as such, agents of the corporation. They have the power, however, to elect the directors, who are the managers of the business and who appoint the necessary active agents and officers.

Directors are elected by a majority vote of the stockholders, each stockholder usually having one vote for each share of stock that he owns. It follows that if one person, or a group of persons acting together, owns a majority of the stock, he, or they, can elect all the directors. To avoid this some statutes provide for cumula-

tive voting. For example, if three directors are to be elected, a stockholder with ten shares may cast ten votes for each of three or may concentrate thirty votes upon one. If there are 1000 shares of stock, and the majority acting together own 740, and the minority 260, the latter, by casting triple votes for one candidate, would give him 780 votes, or more than the majority casting single votes for each of three could muster. Thus the minority would elect one director and the majority two. The registered stockholder is usually the only one entitled to vote. It is commonly provided that a stockholder may vote by proxy, that is, authorize another to vote for him.

The powers of the directors are very extensive and are fixed by the certificate of incorporation and the statutes. The directors are, when convened as a board, the holders of all corporate powers except those which must be exercised by the stockholders. The directors can act only in a duly called meeting. The directors could not change the nature or the purposes of the corporation, increase or decrease its capital stock, dissolve it, or consolidate it with another corporation; these powers are vested in the stockholders; but in the management of the corporation within the limits of the charter powers and by-laws the directors are supreme.

Directors are bound to exercise reasonable care in the conduct of the corporate business, and may become liable to the corporation for losses resulting from their negligence. Directors also stand in a confidential, or fiduciary, relation to the stockholders, and cannot secure to themselves any advantage at the expense of stockholders.

Statutes often require directors to file annual reports with some public officer, and fix a penalty for failure to do so or for the filing of a false report.

167. Officers and agents. The officers of a corporation are appointed by the directors in conformity with the corporate by-laws. Agents, other than officers, are sometimes appointed by the directors and sometimes by an officer. The general law of agency governs the apparent powers of such officers and agents, except that third persons are supposed to know the provisions of the charter as to the powers of the corporation itself. Third persons dealing

with the corporation are not bound to know the provisions of the by-laws as to the powers of the officers. Officers and agents are entitled to compensation, but directors are not unless it is especially voted by the shareholders.

The powers of officers are usually fixed by the by-laws of the corporation. When the by-laws do not fix the powers, they may be prescribed by the directors.

The president is always a member of the board of directors and often presides as its chairman. He is ordinarily empowered to make contracts, deeds, and other documents, either by general or by special vote of the directors, and is the chief officer, in whom is placed the largest measure of authority.

The vice president acts when the president is absent, or, in large corporations, he has some special department of the business confided to him. In large corporations there are often several vice presidents, known as first vice president, second vice president, etc.

The secretary keeps the records of the meetings of the directors and stockholders. He should be and usually is the custodian of the seal of the corporation and attaches it to documents requiring a seal; he may also attest or witness the signature of the president to contracts, deeds, etc., although this is more commonly done by the treasurer. He may have charge of the transfer of the stock certificates on the books of the corporation, and may be designated as an assistant to the treasurer. In many cases trust companies are now made agents of the corporation to record transfers of the stock and keep the stock book.

The treasurer is the financial agent of the corporation. He has charge of its funds, its bank account, its securities, and its general assets. The books are kept under his supervision. He usually countersigns the obligations issued by the corporation in the form of contracts, checks, notes, etc., indorses for deposit or collection the checks payable to it, and in general handles its money and negotiable paper.

The general manager is the chief assistant of the president, and the officer with whom persons having business with the corporation generally deal. He usually appoints the minor agents and servants, makes contracts for ordinary supplies and the sale

of products, and conducts the routine business affairs of the concern. In the case of unusual contracts it is always best to ascertain from the president whether the general manager has authority.

As there are some contracts which even the president cannot make without special authority of the directors, such as the issuing of bonds and notes for borrowing money, the sale of corporate assets and franchises, and the like, it is necessary in cases of doubt to make sure that the act is duly authorized. It is not uncommon for a corporation to repudiate a contract upon the ground that the officer making it exceeded his authority.

168. Powers of a corporation. A corporation as such may be said to possess at the least these necessary powers and qualities:

1. To have a corporate name, as an individual has a name; but, once adopted, the name of a corporation can be changed only as prescribed by law.

2. To have a corporate seal.

3. To sue and be sued in its corporate name.

4. To appoint such officers and agents as its business may require.

5. To make by-laws for the management of its business, the transfer of its stock, the calling of meetings, etc.

6. To acquire and dispose of such property (in its corporate name or under its corporate seal) as may be necessary to its corporate existence or purposes. The amount of real estate it may hold is often limited by law. In the absence of such express restriction, it may hold only what is reasonably necessary for the conduct of the business in which it is engaged.

7. To make such contracts as are reasonably necessary to carry out the purposes for which it is organized. This includes the power to borrow money, give security, and issue negotiable paper, as well as to make the ordinary contracts of sale, agency, etc. But a corporation cannot, unless expressly authorized, enter into a partnership with other corporations or with individuals; nor can it enter into a so-called trust in order to create a monopoly or eliminate competition.

8. In general a corporation may engage in such business as its charter contemplates, and in no other. A partnership may engage

in almost any lawful business, but a corporation has no powers except those expressly granted to it or those reasonably incident to those expressly granted. A corporation authorized to manufacture and sell machinery cannot engage in the banking business or the transportation business. Such acts in excess of powers granted are said to be *ultra vires*, that is, beyond the powers of the corporation. It has been held that a railroad company could not run a steamboat beyond the end of the railroad lines, though it might run one as a ferry to connect its lines. So a steamboat company could not run a railroad, though it might run a short line as a "carry" between two navigable points. Certain powers are regarded as incidental to the express powers, but these do not extend beyond the necessities of the corporate business, and are not to be so broadly construed as to lead the corporation into unauthorized enterprises.

169. Stockholders' rights. Each stockholder has these rights as against the corporation:

1. To have issued to him a certificate of stock representing his interest and, if he is a transferee of stock, to have the transfer entered on the books of the company.

2. To vote at stockholders' meetings. By the generally prevailing rule each stockholder has as many votes as he has shares of stock. He may exercise his right personally or by proxy. The stockholder of record (that is, the one whose name appears on the books of the corporation) is entitled to vote even though he has transferred the stock.

Stockholders often transfer their shares of stock to trustees, who then have the voting power with respect to the stock transferred. These arrangements are called voting trusts. The trustees deliver to the stockholders voting-trust certificates, which provide for the payment of the dividends by the trustees to the stockholders during the trust and the return of the stock at the end of the trust. The stock is held by the trustees for a short period, usually five years. The object of such trusts is to bring about continuity of voting policy during the life of the voting trust and thus enable the corporation to get out of financial difficulties.

3. To inspect the books of the company when a demand to do so is made in good faith and for a proper purpose.

4. To share in dividends when the same have been declared. The profits of the corporate enterprise are from time to time divided among the stockholders by the directors in the form of dividends, each stockholder getting a per cent upon the face value of his stock. If dividends are about equal to the interest upon normal safe investments, the stock remains at or near par; that is, a $100 share of stock sells for $100. If the dividends are large, the stock goes above par; if small or uncertain, the stock goes below par. If no dividends are paid, the stock may become valueless except for voting purposes and to enable holders to control the corporation.

Often directors of a corporation declare a dividend in stock of the corporation instead of in cash. For example, they will vote that the stock of the corporation shall be doubled in amount and each shareholder shall receive one share of new stock for every share of old stock which he held. This is sometimes advantageous from the point of view of financing or taxation.

Profits are what remains after deducting running expenses, improvements, accrued debts, interest on bonds, a fair reserve for depreciation in buildings, machinery, or other equipment, and, perhaps, a sinking fund for the payment of the bonds.

Directors have a large discretion in the matter of declaring dividends, and may add profits to capital instead of distributing them, so long as they act in good faith.

Common stock is that on which the stockholders are guaranteed no dividends and receive dividends only if such are earned and declared by the directors.

Treasury stock is that which has been issued for value and later been bought by the corporation and held in its own treasury.

No-par-value stock has no par. Its worth depends upon the number of the shares outstanding and the actual assets of the corporation. If the stock of a corporation consists of 1000 shares of no-par-value stock and the net assets are $100,000 on dissolution, each shareholder will receive $100 for each share of stock, and the holder of each share of no-par-value stock has a $100

interest in the corporation. Theoretically the purchaser of a share of stock of the par value of $100 buys a $100 interest in the corporation, while the purchaser of one share out of 1000 of the no-par-value stock of a corporation simply buys a $\frac{1}{1000}$ interest which has no monetary value set upon it. No-par-value stock has become increasingly popular in recent years and many corporations have changed their stock from par-value to no-par-value stock.

Preferred stock is that upon which it is agreed to pay a fixed rate of return, practically an interest rate, before any dividends shall be declared on the common (nonpreferred) stock.

Bonds are promises to pay a principal sum with interest and are usually secured by mortgage upon the corporate property. Bondholders are simply creditors whose claims are represented by bonds. A coupon bond is one to which separate interest coupons are attached for each annual or semiannual interest payment (see page 195 *ante*).

5. A stockholder, in behalf of himself and other stockholders, may obtain the aid of a court to restrain the officers from committing a breach of trust, or the corporation itself from engaging in *ultra vires* acts, that is, acts beyond the scope of the charter powers. While the majority of the stockholders and directors rule, they must rule within the limits of the charter powers and by-laws; and if they exceed these, or if their acts are fraudulent, the minority stockholders or directors may obtain an injunction.

170. Liability of stockholders. Stockholders are liable to the corporation for any unpaid portion of their subscriptions to the stock of the corporation. This liability is enforced by an action at law, like any action to collect a debt.

Stockholders are not liable to creditors of the corporation unless the statute or charter provides for some personal liability; but creditors may compel original stockholders, if they have paid to the corporation less than par value for the stock issued to them, to pay the balance if the creditors have been led to believe that stockholders were paying in to the capital stock the full par value. It is a kind of fraud on creditors for a corporation to advertise a capital stock of say $100,000 fully paid in, when in fact it issued

the stock at forty cents on the dollar and the capital stock is therefore only $40,000. So also most courts hold that if the capital stock is fully paid in, but a part of it is thereafter returned to stockholders in the shape of dividends, the creditors may compel the stockholders to refund the dividends so far as necessary to pay the debts of the corporation.

If the statute makes stockholders personally liable for the debts of the corporation, or liable to an amount specified (for example, to an amount equal to the face value of their shares of stock), a creditor who has a judgment against the corporation which he cannot satisfy out of its property may proceed against stockholders who were such when his debt was contracted or, as in some states, when his action was begun.

171. Reports of corporations. The statutes generally provide that a stock corporation shall make an annual report of its affairs and file the same in some public office where any person may inspect it. This is in order that persons who may wish to do business with the corporation may ascertain whether it is in a sound and solvent condition. The report usually contains a statement as to the amount of capital stock authorized, the amount of stock actually issued, the amount of the debts, and the amount of the assets. The statutes quite generally make directors personally liable for debts in case they fail to file such a report, and also for debts contracted upon the faith of the report filed in case it is false in any important particular, and sometimes for damages suffered by persons purchasing stock upon the faith of such false report.

172. Receivers of corporations. When a corporation becomes insolvent, the court may, upon the petition of the directors, bondholders, or other creditors, appoint a receiver of the property and assets of the corporation. A receiver may also be appointed upon the petition of a stockholder if the directors are wasting or misapplying the funds or property. A receiver is an officer of the court and, as such, takes entire charge of all the property and business pending a dissolution or reorganization of the corporation. The property until final decree by the court is therefore in the custody of the court appointing the receiver.

A receiver's certificate is a promise to pay issued by a receiver under authority of the court for the purpose of raising money to carry on the business of the corporation during the term of the receivership. It takes precedence over all other obligations of the corporation, even its first-mortgage bonds.

173. Dissolution of corporations. A corporation is dissolved by the expiration of the time for which it was chartered.

A corporation may be dissolved by the decree of a court for various causes, among which may be mentioned insolvency, failure to use its franchises, abuse of charter powers, violation of law, and other fraudulent or illegal acts. The directors or stockholders may also apply for permission to surrender the charter whenever they regard such a course as beneficial to the interests of the stockholders.

Upon dissolution, after all debts and claims are paid, the remaining assets are divided among the stockholders in proportion to their stock holdings.

174. Monopolies and restraint of trade; Federal laws. In order to break up combinations of business men designed to monopolize business and unduly increase prices (the trusts), Congress, in 1890, passed the Sherman Anti-Trust Act, which forbade contracts and combinations in restraint of interstate trade and made it a crime to monopolize or attempt to monopolize interstate trade of any kind. It was under this act that the Attorney-General prosecuted the Tobacco Trust and the Standard Oil Company and secured court decrees dividing these large trusts into many smaller companies which were supposed to compete with each other. In 1914 Congress passed the Federal Trade Commission Act and the Clayton Act. The former established a Federal trade commission at Washington to investigate and regulate business outside the railroads and banks in somewhat the same way as the Interstate Commerce Commission was intended to regulate interstate railroads. The trade commission has power to investigate corporations engaged in interstate business, either on its own motion or on the complaint of another. It seeks to prevent unfair competition and monopoly and to abolish such unlawful business practices when discovered. The Clayton Act is a supplement to

the Sherman Law of 1890. It defines as unlawful and forbids a number of business practices, as, for example, selling to one purchaser at a lower price than to another, selling goods with a provision that the buyer shall not use the goods of a competitor of the seller, monopoly through ownership of stock in a competing corporation either directly or through a holding corporation (formed simply to hold the stock), interlocking directorates, that is, competing business corporations having the same directors. Now a business man may obtain advice from the Federal Trade Commission as to whether a certain business scheme is fair and lawful, and if a competitor is using or threatening to use an unfair practice the business man may apply to the commission for an order forbidding such conduct, instead of depending on the Attorney-General's office to act, as was the case under the Sherman Law.

REVIEW QUESTIONS

163. Define a corporation. What is meant by calling it a legal creature? What are public corporations? What are private corporations? What two main classes of private corporations are there? What is the object of a stock corporation?

164. How is a corporation created? Explain what constitutes the charter of a corporation formed under a general act. Draw articles of association to incorporate a stock company to quarry and sell stone.

165. Who are members of a stock corporation? How does membership change? What is a stock certificate? How is it transferred? What is the Uniform Stock Transfer Act? Does it make stock certificates negotiable?

166. Who are the directors? How are they chosen? What is cumulative voting, and what is its object? What are the powers of the directors? What is their duty?

167. How are corporate officers and agents appointed? Which officers are entitled to compensation? How are the powers of officers fixed? Define the powers of each. In a corporation what is the final authority as to contracts?

168. Give the powers of a corporation. How much real estate may it hold? May it become a partner? What business may it conduct? What are *ultra vires* acts?

169. What are the rights of stockholders? How many votes does each stockholder have? What are dividends? How fixed? What are profits?

What is preferred stock? What are bonds? When may a stockholder seek the aid of a court to protect his interests?

170. When is a stockholder liable to the corporation? When is he liable to creditors of the corporation in the absence of statutory liability? What is statutory liability?

171. What reports of corporations are required? What do they contain? Where are they filed? What is the effect if they are not filed or are false?

172. Who is a receiver? Whose agent is he? What are receiver's certificates? Are they more or less valuable than bonds?

173. How may a corporation be dissolved? After dissolution, what is done with the assets?

174. What is the object and effect of the Sherman Anti-Trust Law? the Federal Trade Commission? the Clayton Act?

List 20 articles of real property
20 personal prop
1. 15 corporal
5 incorporeal.

PART VI. PROPERTY IN LAND AND MOVABLES

CHAPTER XIV

REAL PROPERTY

I. Estates in Real Property

175. Technical terms used in the law of property. The word "property" is used in its ordinary sense to indicate something which is owned. It means the thing which is possessed and enjoyed. On the other hand, "property" may be used to indicate the rights which the owner has in a tangible or intangible object.

Examples. Doolittle says, "This dog is my property." Barker says, "My property consists of stocks and bonds." This is the more common use of "property," as indicating the thing owned. On the other hand, Calkins says, "The property in the cotton passed to me when I paid for it." Here "property" indicates the rights of possession and use incidental to ownership, and not the cotton itself. This is the more technical use. The word "title" is also used in the same sense when one says, "The title to the land is in my wife."

1. *Real and personal property.* The two most common classes of property are real and personal property, or realty and personalty, as they are sometimes called. Real property, or realty, includes freehold estates in land (see discussion of estates, sect. 176 *post*) and such objects as are so attached or affixed to land as to be regarded as a part thereof.

Examples. 1. Abrams has the right to use and enjoy in every way perpetually the house and lot known as 113 State Street. He is said to have a fee simple estate in this land. This is a freehold estate and is real property. It is called a freehold estate because it is an estate such as was held by freemen under the feudal system in England.

2. Machinery is built into a concrete foundation in a factory in such a way as not to be removable without great injury to the factory and the machinery. The machinery is a part of the land and is real property.

2. *Personal property, or personalty.* Personal property includes all property which is not real property. It therefore includes non-freehold estates in land, such as leases for years; mortgages and liens on land; goods and chattels, like clothing, grain, and cattle; and intangible property not connected with land, as, for example, patent rights and promissory notes.

3. *Corporeal and incorporeal property.* Property may be corporeal or incorporeal. Corporeal property is that which has a body or substance and is tangible and material; incorporeal property is without substance, intangible and ideal.

Corporeal real property consists of land and things affixed to it, like buildings; incorporeal real property consists of certain permanent rights of enjoyment or profit in another's land, as a right of way over it.

Corporeal personal property consists of physical movable articles, as a watch or money; incorporeal personal property consists of rights granted by the government, as a patent right or copyright, rights of action against another (known as choses in action), as a right to a debt or to damages for a breach of contract, etc. Stock, bonds, negotiable instruments, and the like are incorporeal personal property.

4. *Land.* Land comprehends the soil and those things attached to it either by nature or by man, such as waters, trees, ores, houses, fences, etc. The land, in contemplation of law, extends downward to the center of the earth and upward to the highest heavens. Thus, one owning ten acres of land has his ownership defined by a pyramid with its apex at the center of the earth and with its sides passing through his boundaries indefinitely into space. Anyone breaking into this pyramid, or "close," at any point is said to be a trespasser.

It is probable that a landowner's right to the exclusive use of the space above his soil extends only to that portion of the space which he can actually enjoy by building etc. Thus, the flight of an aëroplane above Jones's land at a height so great as not to inter-

fere with Jones's use of the surface is doubtless not a trespass or other legal wrong against Jones.

5. *Practical differences between real and personal property.* These practical differences once existed, and unless changed by statute still exist, between real and personal property.

a. On the death of an owner leaving no will, real property goes to the relatives known as heirs, while personal property goes to the administrator to pay debts and then to be distributed among the relatives known as next of kin. The next of kin who take personalty are often different from the heirs who take realty, but modern statutes tend to make the two classes the same.

b. The right of a wife to an estate of dower, or of a husband to an estate by the curtesy, exists in realty but not in personalty.

c. In general, more formality is necessary to transfer realty, as a deed, while personalty may be transferred merely by delivery.

d. The law of the place where realty is situated usually governs rights in it, while rights in personalty are usually governed by the law of the place of the domicile of its owner.

e. In general the law as to realty is technical, derived from feudal times, while the law as to personalty is more liberal and modern.

176. Estates in land; duration. An estate is the interest which one has in real property. As land is permanent and is not consumed or diminished in the ordinary use of it, there may be different estates in the same parcel of land, one succeeding another in possession and enjoyment. One person owns an estate and has possession and enjoyment; another also owns an estate, but his possession and enjoyment are postponed until the ending of the first estate.

Estates in land are first of all divided into (1) freehold estates and (2) estates less than freehold. The first, we have seen, are real estate, while the second are personal estate and are often called chattels real.

1. *Freehold estates.* A freehold estate is one which is to last for a period not fixed or ascertained, that is, either forever or for a life. Freehold estates are therefore of two kinds: (*a*) estates of inheritance, also called estates in fee; (*b*) life estates, either for the life of the owner or for the life of some other person.

a. Estates of Inheritance. The estate in fee simple, which descends on the owner's death to his heirs, is the usual estate of inheritance in this country. In order to create it in a deed the conveyance at common law must run to the grantee *and his heirs*, as "to William Brown and his heirs." If it ran "to William Brown," or even "to William Brown and his children," or "to William Brown forever," it would give William Brown only a life estate. This technical rule has been almost everywhere changed by statutes which provide that a deed "to William Brown" shall carry a fee simple estate unless a contrary intention appears. In a will the use of the word "heirs" has never been necessary to carry a fee simple estate if it appears to be the intent of the testator to devise such an estate.

b. Life estates. Life estates are of two classes: first, those created by deed or will; second, legal life estates, or those created by law. A life estate of the first class may be for the life of the owner of the estate or for the life of another person (technically called an estate *pur autre vie*). A life estate of the second class may be an estate of dower or an estate by the curtesy. *An estate of dower* is the estate which a widow has from her husband's death during the rest of her life in *one third* of the lands in which her husband owned a fee during the marriage, where she has not released her dower by joining with him in a deed of conveyance or otherwise. Dower has been abolished in some states, and the widow is often given a fee in part of her husband's lands instead of a life estate in a third. *An estate by the curtesy* is the estate which a surviving husband has during the rest of his life in *all* the lands and tenements which the wife owned in fee during the marriage, provided there was a child of the marriage born alive, although the child may have died before the mother. Quite generally the wife may defeat curtesy by selling the land during her life or disposing of it by will. Curtesy has been abolished or modified by statute in many states.

A homestead estate is a creation of statute, and consists in the right to enjoy, free from liability for debts, a certain specified quantity of land occupied as a residence. It is not strictly an estate, but a right of exemption attached to an estate. It extends generally to the head of a family,

that is, one who is under a legal or moral duty to support those living with him. The amount of land so exempted differs in different states, and in the same state more is allowed in the country than in a city. Some states fix it by area, some by value, and some by both. It is usually provided that a husband cannot transfer a homestead estate without his wife's consent. In many states on the death of a husband the widow succeeds to the homestead right, or, if there is no widow, the minor children.

2. *Estates less than a freehold.* These estates are also called leasehold estates and chattels real, and are for a fixed or determinable period of time. They are of four classes: (*a*) estates for years, (*b*) tenancies at will, (*c*) tenancies from year to year, (*d*) tenancies by sufferance.

a. An estate for years is an estate limited for a certain definite time, as an estate for one month, or for one year, or for ten years, or for one hundred years. It is usually created by a lease, and hence is often called a leasehold. What remains in the owner after he makes the lease is called a reversion, because possession reverts, or comes back, to him upon the termination of the lease. Leaseholds are considered under the subject of "Landlord and Tenant" (see section 193 *post*).

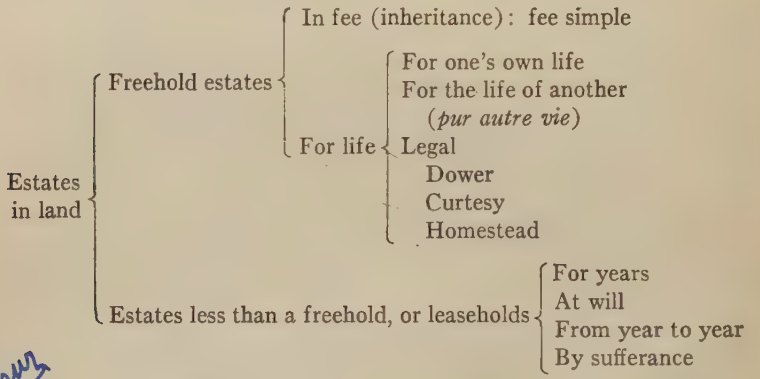
b. A tenancy at will is a tenancy which may be ended at the will of either the lessor or the lessee. Some statutes require a previous notice in order to end this tenancy.

c. A tenancy from period to period is a tenancy for one week, month, quarter, or year, or other period certain, continuing for a successive similar period unless due notice be given to end it at the end of the first or any subsequent period. In case of a tenancy for a year continued into a second year, notice of an intent of either party to terminate it is required. The statutes often fix the time of such notice; in some states it is six months, in others three months, etc. In case of a tenancy from quarter to quarter, month to month, or week to week the notice must usually equal the period in length, being a quarter, a month, or a week respectively.

d. A tenancy by sufferance is a tenancy which arises when a tenant remains in possession after the end of his term without the landlord's consent, as where he has had notice to quit. If the landlord consents to the holding over, the tenancy becomes one at will

or from year to year. If the landlord does not consent to the tenant's remaining in possession, he may by proper proceedings have the tenant removed from the land. Most states now have statutes forbidding a forcible entry by the landlord, even though the tenant is wrongfully in possession.

The above estates may be thus outlined:



177. Future estates in land: reversions and remainders. When an estate for life or for years is created, there is an estate left to commence in possession when the life estate or estate for years ends. Such an estate is either a reversion or a remainder.

1. *Reversions.* A reversion is what is left in the grantor or his heirs after the granting of some estate. It commences in enjoyment only when the lesser, preceding estate is ended. Meanwhile the reversion can be freely disposed of and other lesser estates may be carved out of it.

Examples. 1. Raymond, who owns a fee in land, leases the land to Townsend for ten years. Raymond has a reversion in the land to commence in possession when Townsend's leasehold expires.

2. Raymond afterward grants Lubeck an estate, for Lubeck's life, in the land. Raymond now has a reversion to commence in possession when both Townsend's and Lubeck's estates are at an end. Lubeck's estate for life is subject to Townsend's leasehold, and can commence in possession only when Townsend's estate is ended. Should Lubeck die before Townsend's tenancy expires, the life estate would be of no value.

3. Raymond may sell his reversion, and the grantee will get the same rights as Raymond had. So also Lubeck and Townsend may sell their estates.

2. *Remainders.* A remainder is an estate created by will or deed to take effect in possession at the end of another estate created by the same instrument. The estate first created must be less than a fee simple, for nothing remains to be granted after a fee simple. A remainder is vested if the person who is to have it is living and definitely known; it is contingent if the person who is to have the remainder is not living or is uncertain, but it becomes vested when such person is ascertained. A vested remainder may be transferred, and if not transferred it will pass to the heir of the remainderman upon the death of the latter.

Examples. 4. Cephas grants by deed to Lubin an estate for Lubin's life and a remainder in fee to Roberts. Roberts has a vested remainder because Roberts is living and is sure to get the remainder, and may sell or otherwise dispose of it.

5. Cephas grants by deed to Lubin an estate for Lubin's life, with a remainder to Maurice for his life and the remainder in fee to Roberts. Here Maurice has a remainder for life after Lubin's death, and Roberts a remainder in fee to be enjoyed in possession after the death of both Lubin and Maurice.

6. Cephas grants to Lubin an estate for Lubin's life, with the remainder to Lubin's eldest son. Lubin has no son. The remainder is contingent because Lubin's eldest son is not in existence and it is uncertain whether he will ever have a son. If a son be born to Lubin, the remainder is then vested in the son.

7. Cephas grants a life estate to Lubin, with the remainder to Lubin's eldest son living at Lubin's death. The remainder is contingent and cannot become vested until Lubin's death, and then only if there be a son of Lubin living at the time. Should there be no son of Lubin living at Lubin's death, the estate would revert to Cephas or his heirs.

178. Estates held jointly or in common. Any estate in land may be owned by one person alone or by two or more persons together. The two principal estates owned by two or more together are known as joint tenancy and tenancy in common.

1. *Joint tenancy.* When two or more persons were granted an estate together by the same instrument, the common law construed the estate to be one in joint tenancy unless the language showed some different intent. The principal feature of the estate was that if one of the joint tenants died, the survivors took the

whole estate and nothing passed to the successors of the deceased joint tenant. Now the general rule is that a conveyance to two or more persons (not husband and wife) is presumed to create a tenancy in common and will not create a joint tenancy unless the intent is expressly stated. Executors and trustees, however, generally hold as joint tenants.

Example. Jarndyce by will devised his farm to his three sons, Alfred, Basil, and Cassius. This was at common law a joint tenancy. If Alfred died, Basil and Cassius owned the farm. If Basil then died, Cassius owned it alone. But if Alfred conveyed his interest to Davidson, the joint tenancy was destroyed and it became a tenancy in common by Basil, Cassius, and Davidson. (A devise or grant to Alfred, Basil, and Cassius, without expression of an intent to create a joint tenancy, would now in most states be held to create a tenancy in common.)

2. *Tenancy in common.* When two or more persons hold shares in land under separate instruments, or under an instrument which shows an intent that each shall hold his interest as a separate or individual one, there is a tenancy in common; and statutes now generally provide that all conveyances or devises to two or more shall be deemed to be tenancies in common unless expressed to be joint tenancies, and that heirs shall take as tenants in common. The characteristic of this tenancy in common is that on the death of a tenant in common his share goes to his heirs or devisees, and not to the surviving tenants in common. The tenancy may be ended by a partition of the estate, that is, by a voluntary or forced division of the property.

Example. Fiske devises his farm to Acker, Baker, and Cook as tenants in common. Each owns an undivided one-third interest; neither owns any particular one third of the lot. On the death of one his part will go to his heirs. They may partition the farm so that each will get a definite portion of it. Should Acker purchase Baker's and Cook's portions, Acker would own the whole farm alone.

Partnership land. As a partnership is not a legal creature, it cannot take title to real estate, and a conveyance to the partnership would be ineffective for want of a grantee. The title is conveyed to the partners individually, and they become tenants in common but hold the property subject to partnership debts and to the final accounting among themselves. Upon the death of a partner, title to his share in the realty goes to his heirs, but they hold it practically in trust for the partnership business.

Tenancy by entireties. When an instrument conveys lands to two persons who are husband and wife, they take an estate "by the entireties." The characteristic of this estate is that the survivor of the marriage relation becomes the absolute owner of the land and the heirs of the deceased spouse take no interest. The result cannot be defeated by a will or by prior conveyance by the deceased husband or wife. This estate has been abolished in many states.

Community property. In Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington whatever property is acquired by the labor or efforts of either a husband or his wife after the marriage belongs one half to each. This does not include property owned at the time of the marriage, or property received by way of gift, devise, or descent. This idea came through the civil (modern Roman) law at a time when the Spanish or the French owned the territory from which these states were carved.

179. Equitable estates: trusts. It is also possible to divide the estates in land so that one person has the recognized estate and title in a law court and another person has the estate recognized in an equity court, and thus create what are known as trusts. A trust is the obligation, enforced in an equity court against the holder of the legal title to property (the trustee), to account to another person (the beneficiary) for the income and profits of the property.

Example 1. Cabaniss wills lands to Thomas to receive the rents and income and pay the same to Brockway during Brockway's life, and then to convey to Cadwall. Thomas has the legal title in fee simple and is called a trustee. Brockway has an equitable life estate and Cadwall has an equitable fee in remainder. They are the beneficiaries of the trust. No one could disturb Thomas's title in a law court, but in an equity court Brockway and Cadwall may compel him to perform the trust. When Brockway dies, there should be a conveyance to Cadwall, who will then have the legal title.

A charitable trust is one created for the benefit of the public or of an indefinite number of persons forming a class of the public. Such trusts are enforced by a public officer, usually the attorney-general of a state.

Example 2. Hartley conveys land or other property to Chester to receive the rents and profits and apply the same to the relief of the poor of the city of Cleveland, or to the maintenance of a school, or to maintain a public park, etc. This is a charitable trust.

II. Land: of What does it Consist?

180. Extent of ownership: soil, air, minerals, waters. When one owns land, he controls the space above and below it, subject to such public rights as the right of flight in aircraft, the use of space for radio purposes, etc. If limbs of trees project into the air above his land, he may cut them off to the boundary line. If roots grow into his soil from an adjoining estate, he may cut them off. He owns all the minerals in the land, including the right to take all mineral oils and gases which are at any time under his surface, subject only to any reserved right in the state. In England all gold and silver mines belonged at common law to the king, but in this country such rights are in the landowner. Congress has provided by legislation for the establishment of mining claims in public lands.

A lode, or vein (a line of metal embedded in quartz or rock), may be located to the extent of 1500 feet in the direction in which it runs, and 300 feet on each side. A placer (ground containing mineral in earth, sand, or gravel in a loose state) may be located by one person or association of persons to the extent of 160 acres. The locator of a claim must, in order to obtain a deed from the government, prove that he has put at least $500 worth of labor or improvements into the mineral lands.

The owner of land has a right to use a reasonable quantity of the water flowing over his land in a stream, although he cannot unreasonably divert the waters to the damage of a lower owner. If he owns the lands, he owns the ice formed over them. Lands under navigable waters generally belong to the state. This is almost invariably true as to tide waters, but states differ as to the ownership of the lands under navigable streams where the tide does not ebb and flow. In the case of lakes, the beds of larger ones generally belong to the state, while the beds of smaller ones belong to the private persons whose land surrounds the lake. If one owns the land under waters, he has the exclusive right to fish in such waters. The public has the right to go in boats on such waters as are actually navigable, regardless of the ownership of the land beneath.

Zoning. In many states the legislatures have authorized cities, towns, and villages to establish zones for business, residences, and

other classes of buildings. The object is to promote health and comfort by keeping businesses of the same sort together and having sections exclusively for residences. Thus, one section of the city may be set off for manufacturing; in another, business of all sorts except manufacturing may be allowed; and in another, no business of any sort may be permitted. If these restrictions are reasonably made, they are valid, and a property holder may be prevented by court action from violating the zoning ordinance. It is not lawful, however, without compensation to forbid an owner to continue using his land for a purpose to which he is putting it at the time the zoning ordinance is passed. Such ordinances apply only to future developments.

181. Trees, crops, and other plants. These are divided into two classes.

1. *Fructus naturales* (*natural products*). Things growing on land that are not the result of annual labor and fertilization are classed as perennials, or *fructus naturales*. They grow for several years. Such are trees, bushes, and grasses. Some perennials, as hops, have been excluded, because the crop is dependent upon annual cultivation. Fruit on trees and bushes, as well as the trees and bushes, has usually been included as *fructus naturales*, although often the result of annual cultivation. *Fructus naturales* are regarded as a part of the realty when attached to the land, but a contract for their sale and removal, whether the removal is to be by the seller or by the buyer, is now generally regarded as a sale of personalty (see section 53 *ante*).

2. *Fructus industriales* (*industrial products*). Things growing on land that are the result of annual labor and fertilization are classed as *fructus industriales*. Such are grains, vegetables, and other annual crops. These are regarded as personalty and not as a part of the realty. If one has an estate of uncertain length, as a life estate or an estate at will, and it is ended before the crops he has planted have ripened, he or his representatives may enter and cultivate and gather the crops. This is called the right to emblements. But if his tenancy is for a definite period, he cannot enter to harvest after the tenancy expires. If the owner of a fee dies while crops are ripening, they go to his administrator and not to his heir;

but if he leaves a will, the devisee of the farm takes the crops with the land. Growing crops are personalty, and hence a sale of them falls within the seventeenth section of the Statute of Frauds, even though they are sold before harvesting.

3. *Border trees.* A tree growing on the boundary line between the lands of different owners is owned by them as tenants in common. Neither can lawfully move or destroy it as a whole, but one may cut the branches on his side if he does not injure the trunk. If the trunk is wholly on one side of the boundary, the tree belongs to that landowner; the other landowner may cut off the overhanging branches but cannot use them or the fruit on them.

182. Fixtures. A fixture is an article which, originally personal property, has by attachment to land come to be regarded as realty. Examples are machinery, buildings, boilers, furnaces, etc. It is often a difficult question whether or not the article so attached has become a fixture and so has ceased to be personalty.

This question often arises between a vendor and a vendee of lands; between a mortgagor and a mortgagee of lands; between the heir or devisee of a landholder and his executor; between the reversioner or remainderman and the tenant for years or the executor of a tenant for life; between the mortgagee of the owner's lands and the mortgagee of his personalty; between the landowner and a judgment creditor who seizes the article as personalty; etc. The question usually is whether one who is taking possession of the land may hold the article which has been attached to it as a part of the land or whether the one who is leaving the land, or his representatives, may sever the article and take it as personalty.

While the matter is a complicated and tangled one, the following rules will serve as a fairly reliable guide.

1. In order to be in any event classed as a fixture, the article must almost always be physically attached to the land or to some building or other structure which is itself physically attached.

Exceptions. (1) If the article is an essential part of an attached article, it may be a fixture, although itself a movable, as spare rollers for a rolling-machine or the keys to a house. (2) If the article is of great weight and is kept in place by gravity without actual physical attachment, it may be a fixture, as a building, or a machine, or a large statue. (3) If the article has

been fitted and appropriated to a purpose which, when carried out, would make it a fixture, it may be constructively a fixture, as fence rails laid along a line for a fence begun but not yet finished.

2. If the article is so annexed that to remove it would materially injure what remains, or destroy the article itself, it is usually regarded as a fixture and not removable.

Example 1. Water and gas pipes built into a house are so attached that they cannot be removed without tearing out floors or partitions. But if simply attached to walls or floors by hooks, they might be removed under 3, below.

3. If the article can be removed without injury to the building or destruction of the article itself, then the question whether it is or is not regarded as a fixture often depends upon the relation to the land of the one who attached the article.

a. If the person attaching the article is the owner in fee of the land, and the article is of such a kind as to improve the land, then the article becomes a fixture. If the owner sells or mortgages the land, the fixture which the owner has attached goes with it. If the owner dies, the fixture which the owner has attached goes to the heir or devisee and not to the executor. Of course the owner, while he is owner, may remove the article and make it again personalty, or he may by express provision reserve it from a sale or mortgage, or he may by will direct it to be removed from the land and treated as personalty.

Example 2. Buildings, fences, machinery attached to a structure, furnaces and steam-heating apparatus, bars and counters in business structures, bookcases attached to the walls, paintings on canvas cemented to the walls, heavy stone statues, and the like have all been held to be fixtures. But gas fixtures, such as chandeliers, have been held to be removable furniture.

b. If the person attaching the article is a tenant of the land, and the attachment was for purposes of trade or use in a home, the article may be removed by the tenant at the end of his lease. The law favors the tenant in his efforts to adapt the land and structures to the use to which he wishes to put them during the tenancy, and permits him to remove things which he has attached if he can do

so without too serious an injury to what remains. He must exercise this right before he surrenders possession under his lease. If he renews his lease, he should in the new lease expressly reserve the right to remove articles attached under the former lease or, according to some courts, he cannot remove them after the second lease has started.

Example 3. Buildings not let into the soil, engines, boilers, and other machinery of trade, counters, cases of shelving, and other store furniture, chairs fastened to the floor of a theater, gas fixtures, and the like have all been held to be removable by a tenant. The limit would be fixed when the removal would do a serious injury to the building belonging to the landlord, and upon this test many of the above articles have been held to be fixtures even as between landlord and tenant.

III. Relative Rights of Adjoining Landowners

183. Fences: cattle trespass. At common law the owner of cattle is bound to fence them in or otherwise keep his animals on the premises. The owner of crops is not bound to fence against trespassing cattle. Statutes have in many states changed or modified these rules, and in some the matter is left to township or other local authorities to regulate. Very generally, however, statutes have imposed upon railroads the duty of fencing their property so as to avoid injury to trespassing cattle.

In many states there are statutes compelling adjoining owners to maintain a partition fence at their joint expense.

184. Air and waters; support of land. One owner is not permitted to pollute the air over a neighbor's land by smoke, dust, or odors in such a manner as unreasonably to disturb the neighbor's enjoyment of his property. Neither can he unreasonably disturb his neighbor by noises or vibrations. These acts constitute a nuisance for which damages may be recovered or an injunction issued.

One owner cannot pollute waters flowing from his land to that of a neighbor, nor unreasonably take the water out of the stream or change the channel.

One owner cannot remove the support of a neighbor's land by digging so near the boundary between the two lots as to cause the

neighbor's land to cave in. This does not place a duty on a landowner to furnish support for his neighbor's buildings but only for the land in its natural condition. But one excavating may be liable for negligence in digging or blasting or for negligence in failing to notify his neighbor of an intent to excavate if another's building is injured thereby. Municipal building codes now frequently prescribe rules for excavation in cities.

185. Easements. An easement is a right by one person to do or to compel another to refrain from doing some act on that other's land. It may be acquired by deed or, in some cases, by prescription, that is, by the use of the right without the other's permission for a specified period, usually twenty years. Examples of easements are rights of way for foot passengers or vehicles, or a right to have a neighbor keep open a vacant space on his land.

One cannot by prescription acquire a right to have light and air come to his land from his neighbor's land, but he may by deed get that right. Thus, Jackson buys land of Cleveland, and the latter agrees not to build nearer the line than twenty feet. This gives Jackson an easement to that extent in the light and air from Cleveland's land.

One may by prescription or by deed acquire a right of way over another's land. If one sells to another land not adjoining a highway, there is a "way of necessity" over the seller's remaining land in order to reach the highway.

One may acquire a right to use a party wall, or to drain water, or to take water, or to compel another to maintain a partition fence, and the like. All these are easements.

A highway over one's land is an easement for the benefit of the public generally, who acquire thereby a right to pass to and fro. Of course the public may, and sometimes does, own the fee in the highway also. This is especially true of streets in large cities. But if the fee remains in a private individual, he may use the highway for any purpose not inconsistent with the right of the public. He is entitled to the grass, wood and fruit growing there, and he may forbid others to cut trees or grass, or pasture cattle, or hunt or fish there.

IV. Transfer of Interest in Lands

186. Contract of sale. A contract to sell lands or any interest in lands must be in writing and be signed by the party to be charged (see section 23). While the writing may be an informal paper (a memorandum), it is usual and highly desirable to have a somewhat formal one setting out the terms of the agreement in full. It should be signed by both parties in order that both may be held on it.

The legal title to the land does not pass at the time of making the contract, but only when a deed is given; but courts of equity for many purposes regard the title as having passed to the vendee from the time the contract is made, although payment and delivery of the deed are postponed. As courts of equity regard the vendee as the true owner, they will, by what is known as specific performance of contract, compel the seller to give a deed.

Courts of equity regard the land as already a part of the vendee's realty, so that if he dies the buyer's heir can compel the buyer's executor to pay for it out of the personalty, and the deed from the vendor will be made to the buyer's heir; equity courts regard the unpaid purchase price as a part of the vendor's personalty, and the money, when paid, will go to the vendor's executor in case the vendor has died.

187. Conveyances. Conveyances of interests in lands other than leases are by deed. Of these there are two principal kinds: quitclaim deeds and warranty deeds.

A quitclaim deed conveys whatever title the grantor may have, and throws upon the grantee the risk as to whether there is a good or a bad title or no title at all.

A full warranty deed conveys the title of the grantor, and he covenants, or warrants, (1) that the grantor is seised of, that is, owns, the lands and has the right to convey them; (2) that the lands are unencumbered by mortgage or other burden (unless otherwise stated); (3) that the grantee shall have quiet enjoyment, that is, shall not be put out of possession by anyone having superior title; (4) that the grantor will warrant and defend him in these rights; (5) that the grantor will execute any further instrument necessary to make perfect the grantee's title.

Many states provide by statute for a short form of deed which shall be deemed to carry with it all these warranties.

A deed must be signed by the grantor and in about fifteen states must be sealed; in some sixteen states it must also be witnessed. In order to entitle it to be recorded in a public office like the register's or county clerk's office it must be acknowledged before a notary or other authorized official, or in some states witnessed. Recording is necessary in order to prevent a subsequent sale by the same grantor to a second purchaser or innocent mortgagee. The deed must be delivered to the grantee; usually this is a manual delivery, that is, grantor hands the deed to grantee, but any conduct by the grantor which indicates a desire to have the deed take immediate effect is as good delivery as transfer from hand to hand. A delivery of a deed in escrow is a delivery to a third person upon condition that the deed shall not take effect until some condition is fulfilled, as, for example, until the purchaser pays the price. An agent duly authorized by power of attorney may make and deliver a deed for his principal (see section 142).

If a deed is made by a married man, it is usual to have his wife join in it; otherwise, if she should survive him, she could claim her right of dower in the property conveyed. If a deed is made by a married woman, in about thirteen states the husband is required to join in order that the wife may be able to convey a fee, and in other states her husband should join in it in order to bar his possible estate by the curtesy; but in many states where curtesy still exists by statute the wife is given power to destroy the husband's curtesy by her conveyance, and no joinder by the husband is necessary to free the property from the incident of curtesy. If property is owned jointly, the owners may convey by joining in one deed.

A deed consists of the following parts: (1) the "premises," containing the names of the parties, sometimes the date (though this may be at the end), a statement of the consideration to be paid and of its payment, the words stating that there is a conveyance, and the description of the land; (2) the "habendum," or statement of the size of the estate granted, beginning often, but not

Agreement for Sale of Real Estate

(On Installments)

This Agreement, *Made and entered into this* 14th *day of* May, 19 25 *between* Armand Grosser, of Los Angeles, Cal., *hereinafter called SELLER, and* Le Grand De Graff, of the same place *hereinafter called BUYER:*

Witnesseth: *That Seller hereby agrees to sell to Buyer, and Buyer agrees to buy the following described real property situated in the City of* Los Angeles, *County of* Los Angeles, *State of California, as per map recorded in Book* 133, *Page* 1244, *of* Deeds, *Records of said County; viz.:* (Here insert legal description, not street address)

Beginning at the point of intersection of the southerly line of Brandon Street and the Westerly line of Hollywood Avenue; running thence westerly one hundred (100) feet along the southerly line of Brandon Street to an iron pipe; thence southerly fifty (50) feet parallel with the westerly line of Hollywood Avenue to a stone marker; thence easterly one hundred (100) feet to an iron pipe in the westerly line of Hollywood Avenue; thence northerly fifty (50) feet along the westerly line of Hollywood Avenue to the place of beginning, being lot No. 162 on a map of Casper's Addition to the City of Los Angeles, filed in the records of said County of Los Angeles, Jan. 16, 1922.

For the sum of $ 1000.00, *which sum Buyer agrees to pay to Seller as follows: $* 100.00 *upon the execution and delivery of this agreement, receipt whereof is hereby acknowledged, and the further sum of $* 900.00, *payable in installments of $* 50.00 *or more, on the* first *day of each and every calendar month, commencing with the month of* July, 192 5, *together with interest from* June 1, 192 5, *on deferred payments at the rate of* six *per cent per annum, payable* semiannually

If installment payments include interest, installment shall be credited first on interest then due, and the remainder on the principal sum. Interest shall cease on the amount so applied on the principal.

All *taxes for the fiscal year 19 25 19 26 are to be paid by* Buyer *Buyer agrees to pay, before delinquent, all taxes or assessments of any nature, which may hereafter become a lien upon said real property; upon failure of Buyer to make such payment, Seller may pay the same and add the amounts so paid to this contract.*

Should default be made in payment of any of said installments of principal or interest when due, then the whole unpaid balance of said purchase price and all advancements heretofore made by the Seller, with interest thereon, shall become immediately due and payable at the option of said Seller.

Time is of the essence of this agreement, and in the event of failure by Buyer to comply with the terms hereof, Seller shall be released from all obligations in law and equity to convey said property, and Buyer shall forfeit all rights thereto, and to all money heretofore paid under this agreement, and in the event Buyer should then be in possession of said property, Seller shall thereupon be entitled to immediate possession thereof; or said Seller, at his option, may enforce his rights hereunder by an action in equity or at law for specific performance with damages and/or for the recovery of purchase price with interest.

Seller on receiving the full payments at the time and in the manner above mentioned, agrees to deliver to Buyer the following:

(1) *Grant Deed, conveying said property to Buyer, subject to all taxes assumed by the Buyer hereunder and any and all liens or assessments levied or assessed subsequent to date of this agreement; conditions, restrictions, reservations, rights, and rights of way, of record, if any:*

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(2) *Guarantee or Certificate of Title, or Continuation thereof, or Policy of Title Insurance, issued by* ----------Guaranty and Insurance Co. of Los Angeles----------

Here insert name of Title Company

with liability therein limited to total amount of above purchase price, showing title to said property vested in grantor in said deed, at or subsequent to date of full payment of purchase price as herein above specified, free and clear of incumbrance, except as above specified in deed, and any incumbrance or lien created or suffered by Buyer. In case the above property lies within the corporate limits of a city, the records of which the Guarantee or Certificate of Title or Policy of Title Insurance does not cover, Seller will also furnish a Municipal Lien Report, showing said property free and clear of municipal liens, except: All taxes assumed by the Buyer hereunder and any and all assessments, taxes or other municipal liens levied or assessed subsequent to date of this agreement

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Buyer shall keep the buildings on said property insured against loss by fire in the amount of at least $-----no insurance------*, in the name of Seller, in a company satisfactory to Seller, and said Fire Insurance Policy shall contain notice that said property has been sold under contract, to protect the respective rights of the parties.*

Buyer agrees to pay all costs and expenses of any action commenced by the Seller to enforce this agreement, whether such action progress to judgment or not, together with attorney's fees in a reasonable sum.

Seller shall not be responsible or liable for any inducement, promise, representation, agreement, condition or stipulation not set forth herein.

Possession is to be given Buyer ----------at once----------

In this instrument the masculine gender includes the feminine, and the singular number includes the plural whenever the context so requires.

This agreement shall be binding upon and inure to the benefit of Seller and Buyer and their respective successors in interest.

Witness *the signatures of the parties hereto.*

Armand Grosser
SELLER

Le Grand DeGraff
BUYER

LAND CONTRACT

always, with the words "To have and to hold"; (3) any reservation or exception of that part of the title that is to be made in favor of the grantor; (4) the covenants, or warranties; (5) the conclusion containing the statement that the grantor has signed and sealed, together with his signature and seal and the signatures of the witnesses, if any; (6) the acknowledgment before a notary of the due execution of the instrument or the notary's certificate regarding the witnessing of the deed, where witnessing is allowed or required.

If the grantor owns to the center of a street or the middle of a pond, lake, or river, and it is desired to convey all the grantor's interest, the safest practice is to include an express statement of the intent to convey the interest in the street or the land under water and not to rely on a description which bounds the property by the side of the street or the shore of the body of water.

In large cities it is now customary to have the titles to land investigated by title companies, instead of by lawyers or by the county clerk or register. These title companies make a report on the title which is in effect an abstract of title, or summary of all the steps which have been taken in the past respecting the title to the land. They will also issue a policy of title insurance which protects a purchaser against any flaws which may later develop in the title.

188. Wills. Property may be transferred by will. In order that a will shall be valid it must be signed (in some states subscribed) by the testator, and his signature attested (that is, witnessed) by two or more witnesses. In some states the testator must actually sign in the presence of the witnesses, and they in his presence and in the presence of each other. In many states one who is named as a beneficiary in the will and also signs it as a witness cannot take the gift under the will; hence it is important that the witnesses should not be financially interested in the will.

As a will does not take effect until the death of a testator, a devise or bequest lapses or is destroyed if the donee dies before the maker of the will, unless, as in some states, the statute provides who shall take in that event. In case a devise of land lapses

by the death of the devisee, it will go to the heirs of the maker of the will, unless there be a residuary devise ("all the rest of my property to ——") by which all property not otherwise disposed of is given to a certain person; in this case, in most states it will pass to the person named in the residuary clause, but in some it will even then go to the heir.

At common law the marriage of a woman after making her will revokes the will; but this has to some extent been changed by statute. The marriage of a man after he makes his will, followed by the birth of a child, revokes his will; but this also has in some states been modified or regulated by statute. If a child is born after the will of a married man or woman is made, and there is no provision in the will for such after-born child, most states provide that the child shall take what would have descended to him had the parent died without a will.

A will may be altered by adding to it a codicil, or supplement, which must be executed with the same formality as to witnesses as the original will. A will may be revoked by burning or tearing it up, or by making a later will. In case a will is revoked it is best to burn it, so that there will be no opportunity for dishonest persons to bring forward the revoked will after the maker's death.

In most states a person may not make a valid will of real property until he is twenty-one. This is also frequently true of a will of personalty, but some states permit a will of personalty at eighteen. A person of unsound mind cannot make a valid will. The law of wills is so much a matter of statute that local legislation must be consulted in order that the necessary formalities may be observed and the intention of the testator carried out. It is not prudent for a person to make his will without good legal advice.

189. Descent to heirs. If an owner of real property dies without a will, the real estate (that is, any estate which can be inherited) goes to the persons fixed by statute as his heirs, subject to the estate of dower or curtesy in a surviving wife or husband. The heirs are usually the following: first, children and the children of a deceased child, the latter taking among them the share

which their parent would have taken had he lived; second, if there be no children, grandchildren, or great-grandchildren, the father; third, if there be none of the above, the mother, brothers, and sisters, and the descendants of deceased brothers and sisters; fourth, if there be none of these, other relatives, beginning with

This Indenture,

Made the first *day of* April *in the year One thousand nine hundred and* twenty-five

Between Charles Lewis, unmarried, of the City of Syracuse, County of Onondaga, and State of New York, *of the first part, and* Walter Cooke, of No. 310 Mill St. in said City of Syracuse *of the second part,*

Witnesseth, *That the said* part y *of the first part, in consideration of the sum of* six thousand dollars ($6,000.00) *lawful money of the United States, paid by the* part y *of the second part,* do es *hereby grant and release unto the said part* y *of the second part,* his *heirs and assigns forever,*

All that Tract or Parcel of Land, *situate in the* City *of* Syracuse *County of* Onondaga *and State of New York,* situate, lying and being in the tenth ward of the City of Syracuse, and known as lot numbered three hundred and thirty (330) on a "Map of Land in the city of Syracuse lying between Tenth and Twentieth Streets" and recorded at page 102 of Liber 163 of Deeds in the County Clerk's office of Onondaga County on the tenth day of June, 1899, bounded and described as follows, viz.: Commencing at the point of intersection of the northerly line of Thirteenth Street and the westerly line of First Avenue and running thence northerly along the westerly side of First Avenue forty-three (43) feet, thence westerly and parallel with Thirteenth Street eighty (80) feet, thence southerly and parallel with First Avenue forty-three (43) feet to the northerly side of Thirteenth Street, and thence easterly along the northerly side of Thirteenth Street eighty (80) feet to the place of beginning.

Together *with the appurtenances, and all the estate and rights of the said* part y *of the first part in and to said premises.* **To Have and to Hold** *the above granted premises unto the said* part y *of the second part,* his *heirs and assigns forever.*

And *the said* Charles Lewis, *party of the first part,* do es *covenant with the said* part y *of the second part as follows:*

. . . . . .

. . . . . .

First.—*That the part y of the first part is seised of the said premises in fee simple; and ha s good right to convey the same.*

Second.—*That the part y of the second part shall quietly enjoy the said premises.*

Third.—*That the said premises are free from incumbrances, [except as previously stated].*

Fourth.—*That the part y of the first part will execute or procure any further necessary assurance of the title of said premises.*

Fifth.—*That the said* Charles Lewis, *party of the first part, will forever warrant the title to said premises.*

In Witness Whereof, *The said part y of the first part ha s hereunto set* his *hand and seal the day and year first above written.*

In Presence of
George Rose

Charles Lewis [Seal]

State of New York,
County of Onondaga } ss.
City of Syracuse

On this first *day of* April *in the year One thousand nine hundred and* twenty-five *before me, the subscriber, personally appeared* Charles Lewis *to me personally known to be the same person described in and who executed the foregoing instrument, and* he *acknowledged to me that* he *executed the same.*

[NOTARY'S SEAL]

William A. Peterson
Notary Public for Onondaga County, New York.

FULL COVENANT DEED

the uncles and aunts and their descendants. There are many variations in the statutes, and only a general notion of them can be given here.

If an owner of personal property, including leasehold estates in land, dies without a will, the property goes to his administrator to pay debts, and the balance is then distributed among the persons designated by statute as "next of kin." These statutes are much

like those defining heirs, except that a widow is usually given a considerable portion of the personalty absolutely, say one third if there are children, and one half, or often more, if there are no children or grandchildren.

I, John C. Burlingame, of the City of Columbus, County of Franklin, and State of Ohio being about sixty-eight years of age and of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking and annulling any and all will or wills by me made heretofore:

First: My will is that all my just debts and funeral expenses be paid out of my estate as soon after my decease as shall be found convenient.

Second: I give, devise and bequeath all my property, real and personal, to my beloved wife, Martha C. Burlingame, to be used by her during her life.

Third: At the death of my wife I direct that all my property, real and personal, be divided equally among such of my children as shall then be living.

Fourth: I appoint the National City Bank and Trust Company of Columbus, Ohio, executor of this my will.

In Testimony Whereof, I have set my hand to this my last will and testament, at Columbus, Ohio, this 26th day of May, in the year of our Lord one thousand nine hundred and twenty-five.

John C. Burlingame

The foregoing instrument was signed by the said John C. Burlingame in our presence, and by him published and declared as and for his last will and testament and at his request, and in our presence, and in the presence of each other, we hereunto subscribe our names as attesting witnesses, at Columbus, Ohio, this 26th day of May A. D. 19 25

Conrad Blystone resides at 60 So. Main St, Columbus, Ohio.
Charles M. Walker resides at 312 First St, Columbus, Ohio.

WILL

190. Adverse possession. One may lose and another gain title to real property where the latter occupies it for a long time in such a way as to give adverse possession. This is an open, actual, exclusive, and continuous possession hostile to the true owner for a period of time, varying in the different states from ten to twenty

years, which by statute bars the right of the true owner to bring action to recover the possession. Residing on the land, cultivating it, or fencing it may be enough to show adverse possession. A tenant or other person holding under the owner and admitting the owner's title could not get adverse possession.

V. Mortgages and Liens

191. Mortgages of real property. A mortgage is in form a conveyance of the title to lands, with a clause stating that in case the mortgagor pays to the mortgagee a certain sum to secure which the mortgage is given, the conveyance shall be of no effect. It is giving security for a debt by creating a lien on land, and is executed, acknowledged, and recorded like a deed. If it is not recorded, a subsequent mortgage given by the same mortgagor, taken by a second mortgagee who paid value and was without notice of the first, would be superior to the first; or if the first mortgage was not recorded, one purchasing the land from the mortgagor without knowledge of the mortgage would get the land free from the lien.

In some states an instrument known as a *trust deed* is used as a substitute for the mortgage. This trust deed is a conveyance of the land by the borrower to the lender to be held by the lender in trust till the debt is paid, and to be conveyed back to the borrower when the debt is satisfied. It accomplishes the same purpose as the mortgage.

The debt to secure which the mortgage is given is usually evidenced by a note or bond. The debt and the mortgage which secures it may be assigned. The assignment is formally executed and also recorded.

When the mortgage is paid, a formal discharge or satisfaction is made by the mortgagee or his assignee, and is also recorded.

If the mortgage is not paid when due, the mortgagee may foreclose it and sell the land to pay the debt, interest, and costs, any part of the money realized on the foreclosure sale which is left going to the mortgagor. The mortgage may give the mortgagee a power of sale without requiring the mortgagee to use an action for

This Indenture Witnesseth, That the Mortgagor, Willis M. Kent of the City of Galesburg in the County of Knox and State of Illinois **Mortgage and Warrant**, to Abel C. Goldberg of the City of Chicago, County of Cook and State of Illinois to secure the payment of a certain promissory note executed by Willis M. Kent bearing even date herewith, payable to the order of Abel C. Goldberg the following described real estate, to wit: the North-east Quarter (N. E. 1/4) of the South-west Quarter (S. W. 1/4) of Section Nineteen (19) in Township Eleven (11) North, Range one (1) East of the Fourth Principal Meridian, situated in the County of Knox in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of Illinois, and all right to retain possession of said premises after any default in payment or breach of any of the covenants or agreements herein contained.

And it is Expressly Provided and Agreed, That if default be made in the payment of the said promissory note, or of any part thereof, or the interest thereon, or any part thereof, at the time and in the manner above specified for the payment thereof, or in case of waste or non-payment of taxes or assessments on said premises, or of a breach of any of the covenants or agreements herein contained, then and in such case the whole of said principal sum and interest, secured by the said promissory note in this mortgage mentioned, shall thereupon, at the option of the said mortgagee, his heirs, executors, administrators, attorneys or assigns, become immediately due and payable: And this mortgage may be immediately foreclosed to pay the same by said mortgagee, his heirs, executors, administrators, attorneys or assigns: And it shall be lawful for the said mortgagee, his heirs, executors, administrators, attorneys or assigns, to enter into and upon the premises hereby granted, or any part thereof, and to receive and collect all rents, issues and profits thereof.

Upon the Filing of any Bill To foreclose this mortgage in any Court having jurisdiction thereof, such Court may appoint Arthur M. Thompson or any proper person receiver, with power to collect the rents, issues and profits arising out of said premises during the pendency of such foreclosure suit, and until the time to redeem the same from any sale that may be made under any decree foreclosing this mortgage shall expire; and such rents, issues and profits when collected may be applied toward the payment of the indebtedness and costs herein mentioned and described. And upon the foreclosure and sale of said premises, there shall be first paid out of the proceeds of such sale all expenses of advertisement, selling and conveying said premises, and one hundred dollars attorneys' or solicitors' fees, to be included in the decree, and all moneys advanced for taxes, assessments and other liens; then there shall be paid the principal of said note whether due and payable by the terms thereof or not, and the interest thereon.

Dated, This 20th day of July A. D. 19 25

Willis M. Kent [Seal]

[Seal]

[Seal]

State of ----Illinois---- }
County of ----Knox---- } SS.

I, ----------Ferdinand W. Levine----------

----------a notary public----------in and for said County, in the State aforesaid, Do Hereby Certify, That---Willis M. Kent--

personally known to me to be the same person--whose name----is---- subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that---he---signed, sealed and delivered the said Instrument as----his----free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and----------seal, this --------20th--------day of----------July,----------A. D. 19 25

[Notary's Seal]

Ferdinand W. Levine
Notary Public

MORTGAGE OF LAND

foreclosure. If the land does not sell for enough on a foreclosure to pay the debt, a judgment may be had against the mortgagor for the deficiency in case he has also given a note or bond or has undertaken a personal liability.

192. Liens on real property. A lien on real property gives its holder a right to use the real property as security for the collection of his debt. The lien holder can have the land sold and collect his claim from the proceeds. In some states an unpaid seller of land has a lien on the land for the unpaid purchase money, and a person who has made a contract to buy land, who has paid part of the purchase price, has a lien on the land to the extent of his payment.

In many states one who makes improvements on lands, believing them to be his, and who is afterward put off by one having a better title, is allowed a lien on the lands for the improvements.

Statutes often provide for a lien in favor of unpaid mechanics who have performed labor upon buildings, or in favor of those

Know all Men by these Presents,

THAT Abel C. Goldberg, of the City of Chicago, County of Cook, and State of Illinois,

the part y of the first part, in consideration of the sum of one thousand *Dollars, lawful money of the United States of America, to* him *in hand paid by* Bradner W. Otis, of the same place,

the part y of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, ha s granted, bargained, sold, assigned, transferred and set over, and, by these Presents, do es grant, bargain, sell, assign, transfer and set over unto the said part y of the second part his *heirs, executors, administrators and assigns, a certain* Indenture of Mortgage, *bearing date the* twentieth *day of* July *in the year One Thousand Nine Hundred* twenty-five *made by* Willis M. Kent *and all* his *right, title and interest to the premises therein described, as follows, to-wit:*

the North-east Quarter (N.E. 1/4) of the Southwest Quarter (S.W. 1/4) of Section Nineteen (19) in Township Eleven (11) North, Range one (1) East of the Fourth Principal Meridian, situated in the County of Knox, and State of Illinois

which said Mortgage is recorded in the Recorder's Office of the County of Knox *in the State of* Illinois *in Book No.* 148 *of* Mtges *at page* 41

Together *with the* note *therein described, and the money due or to grow due thereon with the interest,* TO HAVE AND TO HOLD *the same unto the said part y of the second part,* his *executors, administrators, or assigns,* FOREVER: *subject only to the provisos in the said Indenture of Mortgage contained:*

And I *do, for* my *heirs, executors, administrators, covenant with the said part y of the second part,* his *heirs, executors, administrators and assigns, that there is now actually owing on said* note *and Mortgage, in principal and interest* one thousand *Dollars, and that* I *have good right to assign the same:*

And I *do hereby make, constitute and appoint the said part y of the second part* my *true and lawful Attorney, irrevocably, in* my *name , or otherwise, but at* his *own proper costs and charges, to have, use, and take all lawful ways and means for the recovery of the said money and interest,and, in case of payment, to discharge the same as fully as* I *might, or could do, if these Presents were not made.*

In Witness Whereof, I *have hereunto set* my *hand and seal , this* 12th *day of* August *in the year One Thousand Nine Hundred* twenty-five

Sealed and Delivered in Presence of
Max C. Steubner

Abel C. Goldberg [Seal]

[Seal]

. . . . . .

State of----Illinois----} SS.
County of----Cook----}

I,----------Irvine G. Miller----------

----------a notary public----------in and for said County, in the State aforesaid, Do Hereby Certify, That Abel C. Goldberg--

---

---

personally known to me to be the same person--whose name----is---- subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that---he---signed, sealed and delivered the said Instrument as----his----free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and----------seal, this

-------twelfth-----day of--------August,---------A. D. 19 25

{Notary's Seal}

Irvine G. Miller

Notary Public

ASSIGNMENT OF MORTGAGE

who have furnished material for the buildings. These liens entitle the holders of the liens to sell the land to collect their bills.

A judgment against a person, rendered in a Federal court, is a lien on all the lands of the judgment debtor situated in the state in which it is rendered. A judgment in a state court is a lien on the lands of the judgment debtor situated in any county of that state in which such judgment is recorded. The judgment creditor may sell the land on which he has a lien and thus collect his debt.

In most states taxes on a particular piece of land constitute a lien on the land until the taxes are paid.

Before purchasing land one should have all the records carefully searched in order to learn whether the seller's title is good and whether any liens are recorded against the property. An abstract of title is usually furnished by the seller, showing all instruments which are on record affecting the title; this should be examined by the buyer's attorney, and this attorney's certificate that it discloses a good title should be attached.

Know all Men by these Presents, That I, Bradner W. Otis, of the City of Chicago, of the County of Cook, and State of Illinois, DO HEREBY CERTIFY, That a certain Indenture of Mortgage, bearing date the twentieth day of July, A. D. 19 25, made and executed by Willis M. Kent, of the City of Galesburg, County of Knox, and State of Illinois, of the first part to Abel C. Goldberg, of the second part, and recorded in the Recorder's Office of Knox County, in the State of Illinois in Book 148 of Records, on page 41 on the twenty-first day of July, A. D. 1925, and assigned by said Goldberg to said Otis by assignment dated Aug. 12, 1925, and recorded Aug. 13, 1925, in Book 149 of Mortgages at page 145, in the Recorder's Office of Knox County, Illinois, is, with the note accompanying it, fully paid, satisfied, released and discharged.

Witness, my hand and seal, this 11th day of September A. D. 1925

Bradner W. Otis [SEAL]

[SEAL]

State of Illinois, Cook County, } ss. I, Wilhemina A. Vanderborst, a notary public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY, that Bradner W. Otis personally known to me to be the same person whose name is subscribed to the foregoing Instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said Instrument as his free and voluntary act, for the uses and purposes therein set forth.

[Notary's Seal]

GIVEN under my hand and seal, this eleventh day of Sept. A. D. 19 25

Wilhemina A. Vanderborst

Notary Public.

DISCHARGE OF MORTGAGE

The so-called Torrens system of registering titles to land is in force in thirteen states.[1] Under this system one desiring to have his title registered applies to a court. The title is examined by an official examiner of titles. All persons claiming to have any interest in the property are given notice of the proceeding. The

[1] California, Colorado, Illinois, Massachusetts, Minnesota, Mississippi, Nebraska, New York, North Carolina, Ohio, Oregon, Virginia, and Washington, and also Hawaii and the Philippine Islands.

court finally gives a judgment in which it adjudges who are the owners of the property and the nature of the interest of each. An official registrar of titles then issues a certificate of the validity of the title as adjudged by the court. All later transfers of the property are noted on this certificate. The title as thus registered is perfect, and later dealers with the property need not search back of such registration.

VI. Landlord and Tenant

193. The lease and its covenant. Estates for years have already been explained (see section 176 *ante*). The relation of landlord and tenant, or lessor and lessee, is created by a lease, which conveys an estate for years or smaller estate to the tenant and leaves a reversion in the landlord. By the Statute of Frauds all leases for more than a certain number of years must be in writing; in many states leases over three years in length must be in writing; in some states leases over one year must be in writing. A lease need not, however, be under seal.

The estate in the lessee does not commence until he enters under the lease (that is, he could not bring an action as owner of an estate against a trespasser for coming on the land), although he has, of course, his contract right against the lessor for a refusal to allow him to take possession, and the tenant is himself liable as for rent if he refuses to enter. When the tenant enters, he has thereafter the exclusive right to possession during the lease, and may maintain an action against anyone who injures the property. If the wrongdoer also injures the reversion, the landlord may have his action as well.

A lease is in form a conveyance of lands for a term of years or at will, in consideration of a return of rent or other payment. The person conveying is called the lessor, and the person receiving the conveyance is called the lessee. The words of conveyance are usually "grant," "demise," "lease," "let," but any words expressive of an intention to transfer possession are sufficient.

Any express covenant upon which the parties agree may be inserted in a lease. Those almost always present are the lessee's

covenant to pay rent, a covenant that one party or the other will pay taxes and assessments, and the lessee's covenant to surrender the premises in good condition at the end of the term. Other express covenants may be that the lessor will repair buildings or renew the lease, or that the lessee will repair, or not assign or sublet, and the like.

The implied covenants are that the lessor has the right to make the lease and that the lessee shall have quiet enjoyment of the premises. These covenants mean that the lessee shall not be disturbed by the lessor or anyone claiming superior title; the lessor does not warrant the lessee against the acts of trespassers or other wrongdoers.

194. Defects, repairs, and waste. The law is not very favorable to the lessee as regards defects, repairs, or the cutting of timber or the working of mines. He has but a temporary interest and must use the property so as not to decrease the value of the reversion.

1. *Defects.* Except so far as there are express covenants in the lease to the contrary, the lessee takes the premises in the condition in which they are when the lease is executed. There is no implied covenant that they are in good condition or fit for occupation.

There are two exceptions to this rule. (1) The lessor is liable if, known to him, the premises contain some concealed and dangerous defect which the tenant could not observe and which works the tenant an injury, as, if the concealed portions of a building are dangerously defective or if the building has been infected with the germs of some dangerous disease. (2) In England and a few states it is held that in the lease of a furnished house for a short period there is an implied covenant or condition that it shall be fit to live in.

2. *Repairs.* The tenant is bound, unless otherwise provided, to make repairs to an extent necessary to return the premises in substantially the same condition as when he received them, ordinary wear and tear excepted. To this end he is entitled to estovers, that is, to cut upon the premises timber needed for repairs, as well as for firewood. The common law compelled the tenant to restore buildings destroyed by accident or by fire, but in many states this harsh rule has been changed.

A Lease,

Made and executed **Between** Orlando F. McIntosh *of the* City *of* Buffalo, *New York, of the first part, and* Imogene E. Altman *of the* City *of* Buffalo, *New York, of the second part, this* 19th *day of* June, *in the year One thousand nine hundred and* twenty-five.

In Consideration *of the rents and covenants hereinafter expressed, the said party of the first part* has **Demised and Leased** *and does hereby demise and lease to the said* part y *of the second part,* *the following premises, viz:* the house and lot known as No. 404 East Salina Street in said City of Buffalo,

with the privileges and appurtenances for and during the term of two years *from the* 1st *day of* July, 19 25 *which term will end* June 30, 1927

And the said part y *of the second part* covenants *that* he *will pay to the party of the first part for the use of said premises, the* monthly *rent of* one hundred *Dollars* ($100.00), *to be paid* on the first of each month in advance

And Provided *said* part y *of the second part shall fail to pay said rent, or any part thereof when it becomes due,* *it is agreed that the said party of the first part may sue for the same, or re-enter said premises, or resort to any legal remedy.*

The part y *of the* first *part* agree s *to pay all taxes to be assessed on said premises during said term*

The part y *of the second part* covenants *that at the expiration of said term* he *will surrender up said premises to the* part y *of the first part in as good condition as now, necessary wear and damage by the elements excepted*

Witness *the hands and seals of the said parties, the day and year first above written.*

Orlando F. McIntosh [L. S.]

Imogene E. Altman [L. S.]

3. *Waste.* The tenant cannot commit waste; that is, he cannot cut trees (except for estovers for repairs and for fuel), tear down buildings, open mines, take clay or sand, or otherwise substantially injure the permanent value of the land. The tenant may work mines already opened, unless prohibited by his lease. A tenant committing waste is liable for three times the actual damages, and in some states forfeits his lease. He may also be ordered by an equity court to cease continuing to commit waste.

4. *Title.* The tenant cannot deny his landlord's title while in possession under the lease. It would be a fraud on the landlord for a tenant to get possession under a lease and then set up that the tenant or someone else owned the fee.

195. Assignment and subletting. The tenant may, unless he has contracted not to do so, either assign his whole interest or sublet the premises.

1. *Assignment.* Unless prohibited by the lease, the tenant may assign his estate. If he assigns it, he ceases to have any estate, although he remains liable upon his covenant to pay the rent and other covenants, unless the landlord releases him from such covenants. The law may work an assignment by the sale of the tenant's estate for debt or by his death. As an estate for years is personalty, it passes to the executor of the deceased tenant and not to his heir.

2. *Subletting.* Unless prohibited by the lease, the tenant may sublet the premises or any part of them. A grant of the lessee's whole interest is an assignment; a grant of a part of his interest is a sublease. If he has an estate for ten years and grants a lease for eight years, this constitutes a sublease. A sublessee is the tenant of the first lessee, not of the landlord. But neither an assignee nor a sublessee, while in possession, can deny the landlord's title.

196. Rent and remedies for nonpayment. The rent reserved by the landlord who owns a fee is itself real property until due and payable, when it becomes personalty. Hence all rents due at the death of the owner go to the executor of the landlord, while rents not yet due go to the heir or devisee of the landlord.

The remedies of the landlord when the tenant fails to pay the rent are (1) an action in debt or covenant to recover the amount

due; (2) reëntry on the premises by the landlord if such right is reserved in the lease or is given by statute; (3) in some states a lien on the crops grown on the leased premises or other property of the tenant; and (4) in some states the right of distress, that is, the right to seize the chattels of the tenant which are on the premises and sell them to satisfy the rent.

Many states by statute forbid the landlord to take forcible possession of the premises in case the tenant is behind in his rent, and nearly all states provide a simple judicial proceeding for the eviction of a tenant who is in arrears, by means of which the tenant can be removed in a few days.

197. Termination of lease. A lease is ended as follows:

1. When the time fixed in the lease as the length of the lease expires (as to tenants at will and from year to year, see section 176);

2. When the lease is surrendered by voluntary act of the tenant, consented to by the landlord.

3. When there is a breach of the tenant's covenant, which, by the terms of the lease, gives the landlord a right to end the tenant's estate and the landlord enforces the forfeiture.

4. When the landlord's title is wiped out, as when a life tenant who leases the premises dies, or when the landlord is deprived of title by an adverse claimant.

5. By statute in some states when the buildings on the premises are destroyed without the tenant's fault; but at common law the destruction of the premises does not end the lease except where the tenant has hired only a part of the building.

REVIEW QUESTIONS

175. In what senses is the word "property" used? What two main classes of property are there? What is real estate? What is personal estate? What is corporeal real property and what is incorporeal real property? What is corporeal personal property and what is incorporeal personal property? Define land. What practical differences exist between realty and personalty?

176. How are estates in land divided? What is a freehold estate? What two classes are there? Define each. How is each divided? Define dower; curtesy; homestead estate. What four classes of estates less than a freehold are there? Define each.

177. What is a future estate? What is a reversion? What is a remainder? Illustrate.

178. What is a joint tenancy and how is it created? What is a tenancy in common? What are the characteristics of each? How is realty held by a partnership? What is a tenancy by the entireties? What is community property?

179. What is a private trust? How is it enforced? What is a charitable trust? How is it enforced? Illustrate.

180. What is included in the term "land"? What may one do with overhanging branches? Explain the ownership of waters.

181. What two classes of things growing on land are there? Which is realty? Which is personalty? Who owns a border tree?

182. What is a fixture? State the rules to determine whether an article is a fixture. What is meant by physical attachment? When is an attached article clearly a fixture? When is it doubtful? What difference does it make who attaches the article? What may a tenant remove?

183. What is the common law as to cattle trespass? What do statutes provide as to fences?

184. What is a nuisance? What is lateral support?

185. What is an easement? How may it be acquired? How may it be acquired in the case of light and air? How may it be acquired in the case of a right of way? What is a way of necessity? Explain rights in highways.

186. How must a contract to sell land be made? When does title pass? How do courts of equity regard this? Illustrate.

187. How are conveyances of land made? What is a quitclaim deed? What is a warranty deed? What are the warranties? How must a deed be executed? Is delivery necessary? What is an escrow? What are the parts of a deed?

188. How must a will be executed? Explain who should not be witnesses, and why. If a devisee dies before the testator, what becomes of the devise? What effect has subsequent marriage on a will? Who may make a will?

189. If one dies without a will, to whom does his realty go? his personalty?

190. Explain title by adverse possession.

191. What is a mortgage? How is it executed? Why should it be recorded? What is an assignment? What is a discharge? What is foreclosure?

192. What other liens besides mortgages may be created upon lands? When is a judgment a lien? What is an abstract of title?

193. How is an estate for years created? When does it begin? What is the form of a lease? What express covenants may it contain? What covenants are implied?

194. Who takes the risk as to defects in the premises? What exceptions are there to this rule? Who must make repairs? What are estovers? What is waste? What is the penalty for waste? Why can the tenant not deny the landlord's title?

195. What is the effect of an assignment of a lease? When will it occur? How does a sublease differ from an assignment?

196. Is rent realty or personalty? What are the landlord's remedies against a tenant for rent? Is forcible entry allowed?

197. How is a lease ended?

CHAPTER XV

PERSONAL PROPERTY

I. Classification: Kinds and Estates

198. Classification. Personal property consists of the following:

1. Chattels real, that is, leasehold interests in land. These are the interests of the tenant holding a lease for a definite term or a smaller estate. These have already been considered.

2. Chattels personal, including all personal property except property in land. Chattels personal are further divided into:

a. Choses in possession, or corporeal personal property, of which one may take physical possession and control, like coin, cattle, books, etc.

b. Choses in action, or incorporeal personal property, as a right to sue for and recover a debt, a right to share in the profits of a corporation, the right to a patent, copyright, or trade-mark. Such a right may be evidenced by a chose in possession, as where a debt is evidenced by a promissory note, an interest in a corporation by a share of stock, or a monopoly to make and sell an article by letters patent. In such case the paper on which these evidences are inscribed is a chose in possession, but the right is incorporeal, or "in action."

Personal property may become real property by being attached to land as a fixture. This has already been discussed. Real property may become personal by being severed from the land, as when a tree is felled, or minerals are dug, or buildings are pulled down. Some things growing upon land or attached to it are personalty, as growing crops, or articles attached but not fixtures. A few movable articles are realty, as the keys to a house, the title deeds to land, or separable parts of a machine fixture.

199. Property in animals. Animals are either domesticated or wild. In domestic animals like the horse or the cow the owner has

absolute property. In wild animals one may have a qualified or limited property, and this may change into an absolute property.

1. The owner of the land upon which there are wild animals has the exclusive right to hunt, capture, and kill them while they are there. Any person coming on his land for such a purpose without his permission is a trespasser; if such trespasser kills an animal there, it belongs to the landowner.

2. One who captures a wild animal and keeps it in captivity has the exclusive right to it while it is in his possession. If it acquires the habit of returning after wandering at large, it is still his; but if it regains its natural liberty and remains at large, it is no longer his, but belongs to anyone who lawfully captures or kills it. A mere temporary escape, however, may not amount to regaining its natural liberty, as where a canary escapes into the street, or where an animal escapes from a menagerie.

3. One who rightfully kills a wild animal has the exclusive property in it.

4. One who keeps a wild animal of a dangerous or mischievous disposition does so at his peril. If it injures another, he is liable.

5. One who keeps domestic animals is liable if they escape and trespass upon another's land. But he is not liable for injuries due to their vicious disposition unless he knows of such vicious qualities in the particular animal doing the injury. Wild animals and vicious domestic animals, known to be such, one keeps at his peril.

200. Trade-marks; good will; names; patents; copyrights. These are incorporeal property rights which call for special mention.

1. *Trade-marks.* A trade-mark is a name, symbol, or other device put upon goods by a manufacturer or dealer in order to distinguish them from like goods of other persons. It is a kind of commercial seal or signature.

If the name or device is invented or fanciful, the user of it gets a property right in it as soon as he uses it; but if it is a word of common use, he cannot get an exclusive property right in it, although he might prevent another from using it in the same connection for the purpose of deceiving the public. Words which merely describe the article, however, cannot become in any sense exclusive

trade-marks; nor can geographical names, because others in the same place have an equal right to the name of the place of manufacture.

Examples. Excelsior Stoves, Hoosier Drills, Electro-Silicon Powder, Congress Water, Champion Flour, 303 Pens, and the like are good trade-marks because they are fanciful names, not common descriptive terms. Lackawanna coal is not, as against another miner in the same locality, nor Worcestershire sauce, nor Philadelphia cement, because these words describe the locality from which the goods come. But if one grows tobacco at Durham and calls it "Durham tobacco," he may prevent another person growing tobacco elsewhere from using the same name. So if one changes but a single letter, the legend may be deceptive though a different word is used, as where Jackson has used the words "Royal Pens" and Johnson puts out a product called "Loyal Pens." This is called unfair competition.

2. *Good will.* The good will of a business is the good opinion of customers concerning the business and the probability that they will continue to patronize it. It is a valuable asset and may be sold with a business. Usually its sale is evidenced by the right to use the old name, perhaps with that of the successor added. The seller, if he has included good will in the sale with the right to use his name, cannot set up a rival business under the same name. If there is no sale of the right to use his name, he may set up a rival business under the name but cannot represent himself as carrying on the old business or as the successor of it.

3. *Names.* A man may choose his own name, although he usually bears his father's surname and the Christian name given him at his birth. In order to avoid the loss of evidence as to identity, statutes provide for a record of change of name if one chooses to avail himself of it, but one may nevertheless acquire a new name simply by adopting and using it. The law disregards all middle names; it is legally sufficient to use the first Christian name and the surname. So the word "junior" or "senior" is merely descriptive and no part of the name. A man cannot prevent another from using his name unless the other uses it for fraudulent purposes; and one may even be enjoined from so using his own name in trade as to work a fraud, as where, after Huntington has sold a certain kind of gun as "The Huntington gun," another

person of the same name puts on the market a gun stamped "Huntington gun." This is unfair competition.

4. *Patents.* A patent is the right granted by the Federal government to an inventor to have the exclusive privilege of making and selling a novel machine, device, or process which he has discovered.

5. *Copyrights.* A copyright is the exclusive right to make copies of the copyrighted article, as a book or a picture, and sell the same. Copyrights are registered at Washington and protected by Federal law for twenty-eight years. They may be renewed for another like period.

201. Estates in personal property. Personal property, like real property, may be owned by two or more persons as joint tenants, tenants in common, partners, and in community (see section 178 *ante*).

There may be a life interest or estate in personal property with a remainder or reversion in another. If the property is corporeal, the life tenant may possess and use it; but if it is money, the executor usually invests it and pays the income to the tenant for life. If the property is such as is consumed in the use, it must be intended that the remainderman shall have only what may be left at the life tenant's death.

There may also be a trust of personal property (see section 179 *ante*).

II. Acquisition and Transfer

202. Acquisition by occupancy and by finding lost property. The title to personal property may be gained by taking possession of what no one owns or by taking possession of what someone has lost but never reclaims.

1. *Occupancy.* Personal property may be acquired by occupancy, that is, by taking into one's possession what previously belonged to no one or what has been abandoned by a previous owner. The taking of wild animals, the taking of fish from the ocean, and the taking of seaweed on one's own property or on property common to all are examples of the first method. Raising a sunken vessel abandoned by the owner would be an example of the second.

2. *Lost property.* Lost property calls for special consideration. The general rule as to the title of the finder is that if one finds and takes possession of lost property, he has a title good against all but the true owner.

The law distinguishes, however, between lost property and mislaid property. If one finds a pocketbook on the floor of a store, it is lost property and belongs to the finder unless the true owner reclaims it; but if he finds a pocketbook on the counter of a store, it is mislaid or left property and belongs to the owner of the store as bailee for the true owner, instead of to the finder. Should the true owner never reclaim it, the storekeeper retains it.

Treasure-trove is money, coin, or bullion hidden or concealed in the earth or other secret place. In England it belongs to the crown if no true owner claims it. In this country it is generally treated as lost property and belongs to the finder as against the owner of the lands where it is discovered.

Statutes often regulate the rights of finders of lost property, and generally require the finder to advertise the property found. In case the true owner does not reclaim it, some statutes provide that the property or its proceeds shall, in whole or in part, go to some public fund. The rights of finders of estrays (lost cattle) are particularly governed by statute.

If the finder knows who the owner is, or if marks on the property disclose to whom it belongs, the finder is guilty of larceny in keeping the property as his own. But in order that this rule shall apply, the finder must know these facts at the time of the finding, and then form the criminal intent.

Examples. 1. Durfee bought an old safe and delivered it to Jones to repair. Jones found in the space between the outer wall and the lining of the safe a sum of money. Jones may retain the money as against Durfee. The money was lost, not mislaid.

2. A customer in a shop laid his pocketbook on a table and went away and forgot it. Another customer found it there. The shopkeeper is entitled to it as against the finder. This was mislaid property.

3. Arthur was working for Everson in the latter's paper mill, and in picking over rags and paper found a number of bank bills. Arthur is entitled to them as against Everson, because the money was lost.

4. A conductor on a railway train finds a pocketbook in the train. It belongs to the conductor as against the railway company.

5. Severs and Rasmusson, while working for Niles in removing an old building, discovered a rusty tin can containing a large sum of money. Who hid it there is unknown. The money belongs to Severs and Rasmusson as against Niles, because the money was lost.

203. Accession and confusion. Title by accession arises from the natural increase from land and animals; the uniting of the property or labor of one with the property of another; the confusion of the goods of one with the goods of another.

1. *Natural increase.* It is, of course, too plain for argument that if one owns land he owns things which grow on it, whether produced by nature or by man's labor. So, too, if one owns animals he owns their young, the rule being that the offspring go with the dam, or mother.

2. *Accession of chattels. a.* If the chattel of one is, without his consent, united with the land of another so as to become a fixture, the chattel becomes realty and belongs to the owner of the land; the owner of the chattel has only an action for damages for conversion. This is because the land is regarded as the principal thing and the chattel as a minor thing or an accessory.

b. A similar rule applies when the chattel of one is very closely united with the chattel of another: the whole belongs to the owner of the principal chattel, while the owner of the accessory chattel has only an action for the conversion of his goods. Should the chattels be of approximately similar kind and value, the owners would become owners in common of the new product. A thing may be accessory, however, which is of greater value than the principal chattel, if the latter gives its name and character to the whole, as where materials of greater value than an old wagon are used to repair it. So, too, things of inferior value may by their owner be united by his labor or skill with things of greater value so as to create a practically new thing which will belong to him, as where with a smaller quantity of his wool, united with a greater quantity of another's wool, he weaves cloth, or with a smaller quantity of his material, united with a larger quantity of another's, he makes a ship, or furniture, or gold or silver ornaments.

c. If a workman makes a new product by putting labor upon another's chattel so that there is a complete change of identity, the chattel will belong to him if the labor innocently bestowed is the principal item in the value of the new product, but will belong to the owner of the chattel if the chattel is the principal item in the value of the new product. This last rule is qualified where the workman knows the material is not his, many courts holding that in such case he must lose his labor, although it may be more valuable than the chattel.

Examples. 1. Bush uses some links belonging to Cherry in making a chain most of which was made from his own links. The chain is wholly Bush's. Had the links of Cherry about equaled those of Bush in number, the two would have been owners in common.

2. Camp takes $8 worth of canvas belonging to him and $40 worth belonging to Conrad, adds $10 worth of labor, and makes a sail. The sail belongs to Conrad.

3. Bartlett by mistake cuts wood on Tuck's land. The wood as it was while growing was worth about $3 a cord. Bartlett's labor in cutting it is worth about $2 a cord. The wood belongs to Tuck.

4. Bryan by mistake takes Campbell's trees, worth about $25, and makes them into hoops worth about $700. The hoops belong to Bryan. A small excess of value of the labor would not be enough to deprive Campbell of his property, but if the excess is great, the labor becomes clearly the principal thing and the material the accessory thing.

5. As above. Bryan knows the trees belong to Campbell, and puts the labor upon them. Campbell may claim the hoops. Bryan loses his labor because of his own conscious wrong in converting Campbell's property.

6. In Example 5, Bryan sells the hoops to Ammerman, an innocent purchaser. Campbell may reclaim them. Since Bryan had no title, he could give none.

7. Antell steals shingles from Barber and nails them to the roof of Antell's house. The shingles have become Antell's real property and Barber has only an action for damages.

3. *Confusion of goods.* If the goods of one are so confused with the like goods of another that they cannot be distinguished and separated, the title to the mass will depend (1) upon the innocence or willfulness of the owner who caused the confusion, and (2) if willful, upon the possibility of clearly proving how much of his

product is in the mixture. (1) If the confusion is innocent, each will be entitled to his proportionate portion of the mass as that may be reasonably established. The same rule applies where the confusion is by consent, as where wheat of several owners is mingled in a warehouse. (2) If the confusion is willful, the one causing the confusion can claim his share only if he can clearly and decisively prove how much of each was mingled; if he fails in this, he forfeits his share of the whole mass to the innocent party.

Examples. 8. Caffey places his wheat in a bin containing Seaman's wheat, without knowledge that Seaman's wheat is there. The mass will be divided between them, according to the best evidence available as to the quantity which each placed in the bin.

9. As in Example 8, except that Caffey mixed the goods with the intention of defrauding Seaman and with knowledge that Seaman's wheat was there. Seaman can take the whole, unless Caffey can clearly prove how much he contributed to the mass.

204. Transfer by gift. A gift is a transfer of property by the owner without consideration. A gift *inter vivos* (between living persons) is a gift to take effect at once by transfer of absolute possession to the donee, and is irrevocable. A gift *causa mortis* (in anticipation of death) is a gift made, by one in peril of imminent death, by transfer of possession to the donee, but upon condition that if the donor survives the peril, he may revoke the gift and reclaim the property.

In a gift *inter vivos* delivery is the essential requisite, coupled, of course, with the intent to transfer as a gift. An intent to give is not enough. A promise to give is not effective, because there is no consideration for the promise. There must be actual delivery, so as to put the subject matter of the gift out of the control of the donor. If the article is one that may be delivered by transfer from hand to hand, that form should be followed. But if the article is bulky, or in the hands of a third person, a symbolic delivery will do, as the delivery of a key to the room where the article is kept, or the transfer of a warehouse receipt; but the delivery of the donor's own check (order) on a bank is not effective as a gift unless, before the death of the donor, the donee actually obtains the money. If the donee is already in possession, no new delivery

is necessary; it is sufficient to show clearly the words of the gift. So an instrument under seal known as a deed of gift, if duly delivered, will take the place of the delivery of the thing which is being given. If a creditor wishes to discharge a debt, he should give the debtor a release under seal, but a receipt in full duly delivered and the balancing of the account on the books of the donor have been held sufficient.

In a gift *causa mortis* delivery of the article given is also necessary. The peculiarity of this gift is that it must be made in expectation of imminent death (not merely of the certainty of dying sometime), and that the gift is to become absolute only in case the donor dies, of the illness or peril then existing, without having revoked the gift. If the donee dies before the donor, the gift is likewise revoked. If the donor recovers from his sickness or escapes the peril, he may reclaim the gift, and he may before his death revoke it. One in his last illness may make an absolute gift *inter vivos* or a conditional gift *causa mortis*, and it is a question of fact whether he intended to make the one or the other. A gift *causa mortis* bears considerable resemblance to a legacy in a will, differing mainly in this, that in a gift *causa mortis* the article is delivered to the donee before the death of the donor, and no writing is necessary, while in the case of a will there is no delivery till after the donor's death, and writing is required.

Examples. 1. A father places in an envelope certain articles and securities, indorses it, "The inclosed are for my son John," signs his name, and puts the envelope and its contents into his safe, where they are found after his death. This is not a valid gift. There has been no delivery of the contents of the envelope to John.

2. A father gave to Hutchinson a bag of coin, saying the contents were for his daughter. This was a valid gift. The delivery may be to a third person for the donee.

3. A father lent his son a horse and buggy. After the son had possession, the father said, "I give you that horse and buggy." This was a valid gift. There need not be a new delivery at the time of the gift.

4. A father in contemplation of immediate death gave to his son his (the father's) promissory note for $1000 payable to the son, and to his daughter his (the father's) check on a bank for $1000 payable to the daughter. The first gift is invalid; it is a mere promise to pay or to give. The second gift

is valid if the check is cashed before the father's death, but the death of the father revokes the authority of the bank to pay it.

5. A father gives and delivers to his son the promissory note of Mays payable to the father and indorsed to the son, and to his daughter the check of Murchie payable to the father and indorsed to the daughter. These are valid gifts. If the instruments are payable to the father's order, he should indorse them, but his failure to do so will not, it seems, render the gift invalid.

6. A donor in his last illness told the nurse that his pocketbook was under the pillow, and that she was to take it and give it to the son. This was not a valid gift, because there was no delivery of the purse to the nurse for the son in the lifetime of the donor.

7. The donor has money deposited in a savings bank. He delivers the savings-bank book to the donee as a gift. Most courts hold this sufficient to constitute a valid gift. It would not be sufficient in the case of an ordinary deposit in a bank of deposit; in such case there must be a due and formal written assignment of the claim against the bank.

8. If Babcock, with the intent to make a gift to Norton, deposits money in a savings bank in the name of Norton, and takes the savings-bank book in Norton's name, there is a valid gift. But intent must be established; it may be that the deposit was made in this way because Babcock had already deposited in his own name all that the rules of the bank permitted and was merely using Norton as a dummy. The delivery of the book to Norton would quite clearly show Babcock's intent, but this is not essential if intent otherwise appears, as from a declaration that he has made the gift.

9. One may make a gift in the form of a trust either (1) by declaring that he holds a sum of money in trust for Cass or (2) by transferring the property to Tompkins to hold in trust for Cass. In the first case there is an "equitable gift" without any delivery of the money and by a mere declaration.

10. If Abbott deposits his money in a bank and has the account entitled, "Abbott in trust for Brayton," the courts hold that Brayton is not entitled to the money unless there is some further evidence of Abbott's intent to make a gift, as if Abbott leaves the account in this form at his death, or hands Brayton the bank book, or notifies Brayton of the account. The mere deposit is regarded as ambiguous and possibly made to get greater interest or accomplish some other result.

205. Other modes of transfer. Other methods of transfer are by sale, will, distribution when the owner dies without a will, seizure and sale for debt, mortgage, and at common law by marriage.

To all to Whom these Presents shall Come:

Know Ye, *That* Olive C. Semple, of 312 So. Orange St., Albany, N. Y., *indebted unto* The Eveready Loan Co. of the same place *in the sum of* one hundred *Dollars and* no *Cents* ($100.00), *being for* money loaned

Now for Securing the Payment *of said debt, and the interest thereon from the date hereof to the said* The Eveready Loan Co., Olive C. Semple do es *hereby*

Sell, Transfer and Assign *to the said* The Eveready Loan Co., *all the goods, chattels and property mentioned and described in the following*

SCHEDULE, VIZ:

one Parlor Grand Piano

And do es *hereby represent and warrant that* she is *the true and lawful* owner *and* ha s *the right to mortgage, sell and transfer the same, and that the same are free and clear from any and all liens, claims and incumbrances thereon; and that the same are now in* her *possession at the* City *of* Albany, *N. Y.*

Provided Always, *And this mortgage is on the express condition, that if the said* Olive C. Semple *shall pay to the said* The Eveready Loan Co. *the sum of* one hundred *Dollars and* no *Cents* ($100.00), *with interest thereon, as follows, viz:* at 6 per cent from June 13, 1925

which said sum and interest the said Olive C. Semple *hereby* agree s *to pay, then this transfer to be void and of no effect; but in case of non-payment of the said debt and interest at the time above mentioned, then the said* mortgagee, *or* its *representatives or assigns, shall have full power to enter upon the premises of the said* part y *of the first part, or any other place or places where the goods and chattels aforesaid may be, and take possession of the said property, to sell the same at public or private sale, and the avails,*

. . . . . .

. . . . . .

(after deducting all expenses of the sale and keeping of the said property), to apply in payment of the above debt; and in case the said The Eveready Loan Co., its *representatives or assigns, shall at any time deem himself or said property, debt or security unsafe, it shall be lawful for* it *to take possession of said property, and to sell the same at public or private sale, previous to the time mentioned for the payment of the said debt, applying the proceeds as aforesaid, after deducting all expenses of the sale and keeping of the said property. And the said* mortgagee, its *successors or assigns, may purchase at any such sale, in the same manner and to the same effect as a person not interested herein. If from any cause said property shall fail to satisfy said debt, interest, costs and charges,* I *covenant and agree to pay the deficiency.*

In Witness Whereof, I *have hereunto set* my hand *and seal the* 13th *day of* June, *One thousand nine hundred and* twenty-five

In Presence of

Olive C. Semple [L. S.]

[L. S.]

State of New York.

County of Albany } *ss.*
City *of* Albany }

On this 13th *day of* June, *in the year One thousand nine hundred and* twenty-five, *before me, the subscriber, personally appeared* Olive C. Semple

to me personally known to be the same person *described in and who executed the foregoing instrument, and* She *acknowledged to me that* She *executed the same.*

Bradford D. Barker
Notary Public

CHATTEL MORTGAGE

A chattel mortgage is the transfer of the title to personal property as security for a debt, upon condition that if the debt is duly paid the mortgage and transfer shall be null and void. It is generally provided that in order to be a valid chattel mortgage against later purchasers or mortgagees in good faith of the same goods from the mortgagor the chattel mortgage must be recorded in a public office, and some states require the record to be renewed annually in order to remain valid. Unless otherwise provided, the chattel mortgagee is entitled to possession of the mortgaged goods, but it is usual to leave the mortgagor in possession until default or

until the mortgagee feels insecure. When possession is taken by the mortgagee after default, the mortgagee becomes the owner of the goods at law, but courts of equity give the mortgagor a right to redeem them, that is, get them back by paying what was due on the debt. To cut off this right to redeem, the mortgagee forecloses it by a sale of the goods either under a judicial proceeding or, if the mortgage gives him a power of sale, without such proceeding.

At common law a husband became owner of all the personal property owned by the wife at the time of the marriage. Most states have changed this rule by providing that a married woman shall own and control all her property.

REVIEW QUESTIONS

198. Of what does personal property consist? What are choses in action? When does personal property become realty? When does real property become personalty? What property attached to land is personalty?

199. What right has a landholder in wild animals on his land? What sort of property has one in a captured animal? How is it lost? If one kills a wild animal, whose is it? For what damage done by his domestic animals is one liable? by wild animals kept in captivity?

200. What is a trade-mark? When is it property? If not property, has anyone a right to use it? What is good will? What property has one in his name? What is the name recognized by the law as sufficient?

201. What estates are there in personal property?

202. What is title by occupancy? Who owns lost and found property? What is mislaid property? What is treasure-trove? Who owns it?

203. What is title by accession? If the chattels of different owners are attached to each other, who owns the article so made? If one puts labor on another's chattel and increases its value, who owns it? Distinguish and illustrate. If one innocently mixes his goods with those of others, who owns the mass? If one willfully mixes them, who owns the mass?

204. What is a gift *inter vivos*? What is a gift *causa mortis*? Explain the essentials of each. How can one make a gift of a debt to his debtor? Is a gift revocable? Can one make a gift of his own promissory note or check, and why? When is a gift of a savings-bank deposit good?

205. What other modes of transfer of personalty are there? What is a chattel mortgage? Why should it be recorded? Who is entitled to possession of the mortgaged chattels? After default where is the title? What is the equity of redemption and how is it disposed of?

GLOSSARY

(Terms fully defined in the text are not included in this Glossary. For such terms the Index should be consulted.)

Abstract of title. An outline history of the title to land, consisting of a synopsis, or summary, of all conveyances, mortgages, liens, and charges affecting the parcel of land in question.

Acceptance. (1) The assent of the offeree to the proposal of the offeror, thus concluding a contract; (2) the act by which the drawee of a bill of exchange assents to the request of the drawer to pay it and makes himself liable to pay it.

Acceptor. The person who accepts a bill of exchange.

Acceptor supra protest. The person who, after it is protested, accepts a bill of exchange for the honor of the drawer or an indorser.

Accession. (1) That which is united to, or produced by, property; (2) the right to all that one's property produces or that is united to one's property.

Accommodation paper. A bill or note to which the accommodating party puts his name as indorser, maker, or drawer without consideration, in order to lend his credit to another.

Acknowledgment. (1) In conveyancing, the act by which one who has executed a deed or other instrument goes before a notary public or other authorized officer and declares or acknowledges that he did execute the instrument; (2) the certificate of the officer to that effect.

Act of God. Inevitable accident beyond human foresight or control. See *Vis major*.

Act of honor. The instrument drawn up by a notary certifying that a bill has been protested and that a person named has accepted or paid it for the honor of the drawer or an indorser.

Action. The proceeding in a court for the enforcement of a right; also called a suit.

Administrator. A person appointed by the court to administer the estate of a deceased person who has not by will named an executor. The feminine form of this word is "administratrix."

Admiralty. (1) The system of law governing maritime causes; (2) the court administering this law.

Adverse possession. A possession of real property adverse to the right or title of another. If continued for a specified period, usually twenty years, it cuts off the right of the other to reclaim the property.

Affidavit. A written declaration under oath.

Agistor. One who pastures cattle for another.

Aleatory. (Latin *alea*, a die, or chance.) Depending upon an uncertain event.

Alienate. To convey; to transfer the title to property.

Allonge. The strip of paper attached to a bill or note to receive further indorsements after the back of the instrument is filled.

Alteration. A change in the terms of a written instrument.

Ancestor. One from whom a person has descended in a direct line. Sometimes used in the broader sense of one from whom a person has inherited lands.

Answer. (1) In pleading, the matter set up by way of defense to an action; (2) a formal written statement containing the defense to an action.

Ante (Latin). Before. Used in referring to a preceding part of a book.

Appeal. The removal of a cause from an inferior to a superior court in order to have the action of the lower court reviewed.

Articles. A document containing the terms of an agreement.

Assets. (1) Property of a deceased person or a bankrupt available for payment of debts; (2) the aggregate available property of a merchant.

Assignment. The transfer of rights or interests.

Attachment. A process by which property is seized pending a suit.

Bankrupt. A person who under the bankruptcy laws is liable to have his property seized and distributed among his creditors.

Beneficiary. (1) A person entitled to the income or enjoyment of property the title to which is held by another as trustee; (2) the person to whom a life-insurance policy is payable.

Bequeath. To give personal property by will to another.

Bequest. A legacy or gift of personal property by will.

Bilateral. In contract, signifying an agreement executory on both sides.

Bona fides (Latin). Good faith. *Bona fide*, in good faith.

Bond. A sealed obligation to pay money. A bond and mortgage consists of a bond with a mortgage to secure its payment.

Bought note and sold note. A bought note is given to the seller and a sold note is given to the buyer by a broker who acts as agent between the parties. These are memoranda of the contract.

Breach. The violation or nonfulfillment of an obligation.

By-laws. Regulations or rules adopted by a corporation for its own government.

Case. A statement of facts upon which an action in a court is based.

Caveat emptor (Latin). Let the buyer beware.

Caveat venditor (Latin). Let the seller beware.

Champerty. A bargain by which an attorney agrees to carry on a suit at his own risk and cost in consideration that he shall receive in case of success a part of the proceeds of the suit.

Chancery. (1) A court of equity; (2) the system of jurisprudence administered in a court of equity.

Charter. (1) A legislative act, together with proceedings taken thereunder, by which a corporation is created; (2) to hire or lease a vessel.

Charter party. The contract by which a vessel or some principal part thereof is let for a voyage.

Chattel. An article of personal property. A more comprehensive phrase than "goods," since it includes chattels real.

Chattel real. A chattel interest in land, as a leasehold.

Chose. A thing; any article of property. A chose in action is a right of action to recover a debt, demand, or thing.

Civil action. An action to establish a private right, as distinguished from a criminal action.

Civil law. The Roman law as distinguished from the English law.

Code. A legislative enactment intended to embody the law on a particular topic or, as in some states, on all topics.

Collateral. (1) In the law of descent, in a side line, not direct or lineal; (2) in commercial law, a security additional to the personal obligation.

Commercial paper. Bills, notes, and checks given in the course of commercial transactions. It does not include accommodation paper.

Common law. (1) The law of England, as distinguished from the civil law; (2) that part of the law of England developed by the common-law courts.

Complaint. The name of the pleading by the plaintiff in an action at law. Sometimes called a declaration.

Composition. An agreement between an insolvent debtor and his creditors whereby the latter agree to take less than the whole of their claims.

Compromise. An agreement to settle a dispute made in view of the uncertainty of legal rights.

Conversion. An unauthorized assumption and exercise of ownership over goods belonging to another. It is a tort.

Conveyance. An instrument in writing under seal, by which any estate in real property is created, transferred, mortgaged, or encumbered.

Copyright. An exclusive right granted by the government to make copies of and sell a literary or artistic production.

Corporeal. Having an objective, material existence, capable of being seen and touched.

Costs. An allowance made to a successful party to a suit, to compensate for his expenses in conducting it.

Covenant. A promise contained in a sealed instrument.

Custom. In law, a usage so well established as to be regarded as having the force of law.

Damages. A money compensation recovered in a court for some injury or loss sustained through the wrongful act or omission of another.

Deceit. A fraudulent representation or device by which a person is misled to his damage.

Declaration. The pleading in which a plaintiff states his cause of action. See *Complaint*.

Decree. The name given to the judgment of a court of equity.

Deed. (1) Any sealed instrument; (2) a conveyance of real property.

Defendant. The person against whom an action is begun.

Del credere (Italian). Of trust or credit. Applied to an agent who guarantees that purchasers will pay for goods of the principal sold to them.

Descent. In real property, the title given by force of law upon the death of an owner.

Devise. A gift of real property contained in a will. The devisee is the one to whom it is given; the devisor is the one who gives it.

Earnest. A sum paid to bind a bargain.

Easement. A right in the owner of one parcel of land, as owner, to some privilege in the land of another.

Emblements. Annual products of the soil raised by labor and industry.

Encumbrance. A claim, lien, or liability attached to property, as a mortgage, judgment, etc.

Equity. The system of jurisprudence administered in the equity courts. See *Chancery*.

Equity of redemption. The period allowed by equity for a mortgagor, pledgor, etc. to reclaim his property by paying the debt secured by it.

Escrow. A deed delivered to a third person to be held until the happening of some event, and then delivered to the grantee.

Estate. The interest one has in property. Sometimes used broadly to include all of one's possessions.

Estoppel. A bar raised by the law to preclude a man from setting up certain facts because of some prior admission or conduct. The verb is "to estop."

Estovers. The right of a tenant to take wood necessary for fuel, fences, and repairs is called a right to estovers.

Executor. A person appointed by the maker of a will (the testator) to carry out its provisions. The feminine form of the word is "executrix."

Fee (same as feud or fief). Originally land held of a superior lord in consideration of military service. Now an estate in lands which can be inherited.

Fee simple. An absolute, unqualified fee; the largest estate one can have in lands.

Fiduciary. (1) As a noun, a person in a relation of trust or confidence; (2) as an adjective, signifying a relation of trust or confidence.

Forcible detainer. Keeping possession of lands by force.

Forcible entry. Taking possession of lands by force.

Foreclosure. A proceeding for extinguishing the right of a mortgagor or pledgor to redeem the property given as security for a debt.

Forgery. Fraudulently making or altering a writing.

Franchise. A special privilege conferred by law upon an individual

or a corporation, which does not belong to persons of common right.

Fraud. Some willful act or device calculated to influence or mislead a person to his prejudice.

Fructus industriales (Latin). Fruits of industry; products of land raised by labor.

Fructus naturales (Latin). Fruits of nature; natural products of land.

Fungible. Capable of being estimated or replaced by weight, measure, or number without reference to the particular characteristics of each unit.

Good consideration. A consideration based on family relationship or love and affection. A valuable consideration is one based on the surrender of something having a legal value.

Goods. Articles of personal property. Usually applied to inanimate movables. "Chattel" is a broader term.

Grant. A term signifying a transfer by deed of an interest in real property.

Heir. The person to whom by law the title to real estate descends upon the death of his ancestor.

In statu quo (Latin). In the condition in which (one was before).

In transitu (Latin). In transit.

Incorporeal. Without body or material substance, not capable of being seen or touched.

Indemnify. To save harmless; to secure against loss or damage.

Indenture. Formerly a deed in two copies with cut or serrated edges so that one would fit into the other. Now any deed by which two or more parties enter into obligations each with the other.

Indorse. Literally, write on the back of.

Injunction. A writ issued by a court of equity, forbidding or commanding something.

Insolvency. Inability to pay debts when due.

Inter vivos (Latin). Between living persons.

Intestate. Without a will or testament.

Joint and several. An obligation by two or more which may be enforced against all jointly or each individually.

Judgment. The decision of a common-law court in an action before it; the final determination of the rights of the parties.

L.S. Abbreviation for *locus sigilli* (place of the seal).

Law. The rules by which courts are controlled in the administration of justice.

Legacy. A gift of personal property by will.

Levy. A seizure of property to satisfy a judgment.

License. A permit to do an act which would otherwise be illegal, as to enter another's lands, but not creating an easement.

Lien. The right to the possession of property or to a charge against it by which the property is made security for a debt or other obligation.

Liquidated damages. Agreed or fixed damages, not uncertain damages.

Majority. Full legal age; usually twenty-one years.

Minority. Under legal age; infancy.

Municipal law. The law of a particular country as distinguished from international law.

Negligence. A failure to use the care that a reasonably prudent man would use under like circumstances.

Next of kin. Those relatives who share by law in the personal property of a deceased person.

Nominal damages. A trifling sum awarded to vindicate a legal right where no substantial damages have been suffered.

Notary public. A public officer authorized to certify or attest documents, take acknowledgments of deeds, etc.

Nuisance. A wrongful act which disturbs another in the enjoyment of real property or of a public highway.

Obligation. A legal duty to do or not to do a certain thing. An obligor is one who has undertaken an obligation. An obligee is one entitled to the performance of an obligation.

Orphans' court. The name given to the probate court in a few states.

Ownership. The right to possess and use property to the exclusion of others.

Parol. A word or speech; that which is expressed orally, not in writing.

Patent. An exclusive right granted by the government to make, use, and sell an article.

Per procuration (abbreviated "per pro."). By proxy. Used in England to indicate an agent that is acting under a special or limited authority.

Personal representative. An executor or administrator of a deceased person. The "real representative" is the heir of the deceased person.

Plaintiff. The person who brings an action in a court.

Pleadings. The written allegations as to claims and defenses in an action in a court.

Post (Latin). After. Used in referring to a subsequent portion of a book.

Prescription. Title by adverse possession to incorporeal rights in land. The law indulges the fiction that there was a prior writing which is now lost, conveying the right to the adverse possessor.

Probate. To prove, as to probate, or prove, a will. A probate court is one in which wills are proved.

Proof. The establishment of a fact by evidence.

Pur (sometimes *per*) ***autre vie*** (French). For another's life.

Quantum meruit (Latin). As much as he deserved. Refers to an action for the reasonable value of services.

Quantum valebant (Latin). As much as they were worth. Refers to an action for the reasonable value of goods sold and delivered.

Quasi (Latin). Like; corresponding to.

Ratification. The confirmation of a previous contract or act which is not binding.

Receiver. A person appointed by a court to take possession and control of property pending litigation and some final decree of the court.

Recording acts. Statutes providing for the recording of deeds, mortgages, etc. in some public office, and providing that the record shall be constructive notice to all subsequent purchasers or encumbrancers.

Redemption. The act by which a mortgagor, pledgor, etc. reclaims the title and possession of the property by paying the debt so secured.

Release. The giving up of a claim, by the person entitled, to the person against whom the claim exists.

Replevin. An action to recover possession of goods.

Residuary devisee. The person who under a will takes all the lands of the testator not specifically devised.

Residuary legatee. The person who under a will takes all the personal property of the testator not specifically bequeathed.

SS. An abbreviation used in an affidavit or acknowledgment after the statement of the venue (state and county) and supposed to be a contraction of *scilicet* (*scire licet*), meaning "as one may learn," or "to wit," or "namely."

Seised. The technical term describing the possession of a fee in lands. This is the verb. The noun is "seisin."

Seisin. Under the feudal system the completion of the formalities by which one was given possession of a fee in lands. Now the possession of a fee.

Set-off. A counter claim or cross demand which a defendant sets up against the claim of the plaintiff.

Simple. (1) In real-property law, absolute, unconditional, as fee simple; (2) in contract law, unsealed.

Specialty. A contract under seal.

Specific performance. A decree by an equity court that a party shall actually perform his contract promise instead of paying damages for the breach.

Status. Legal position or condition.

Statute. An act of the legislature.

Statute of Limitations. A statute fixing a time within which actions must be brought.

Stock. (1) The total capital put into a corporate enterprise; (2) the interest of each stockholder in the corporation.

Subrogation. The substitution of one person in the place of another with respect to rights, claims, or securities. The verb is "to subrogate."

Subscribe. To write under; to write the name under the contract. To sign is to write the name at any place, not necessarily underneath.

Successor. One who succeeds another. Used to describe those who constitute a corporation after the retirement of preceding corporators.

Suit. A proceeding in a court. It is not uncommon to call a proceed-

ing in a law court an action, and one in an equity court a suit; but this is not a necessary distinction.

Supra protest. Over protest. Used in the sense of "after protest."

Surrogate. Literally, one who is substituted for another. By present usage the judicial officer who presides over a probate court for the administration of the estates of deceased persons.

Tenant. Broadly, one who holds land; specifically, one who holds land for life or for years; popularly, one who holds lands for years of a landlord or lessor.

Testament. That which is witnessed. The word is employed as a synonym for "will." Formerly it meant a will of personalty, but now it is used interchangeably with the term "will."

Testator. One who makes a will. The feminine is "testatrix."

Title. (1) The right to property; (2) the evidence of the right to property.

Tort. A wrongful act, other than a mere breach of contract, for which a common-law court will give damages.

Transcript. An official copy of a court record, as a transcript, or certified copy, of a judgment.

Trespass (Old French *trespasser*, to pass over or beyond). To invade another's right of security of person or of property. Commonly, to enter another's lands wrongfully.

Trover (Old French *trover*, to find). An action for the recovery of damages for the conversion of goods, based originally on a fiction that the defendant had found the goods and refused to return them to the rightful owner.

Trustee. A person appointed to carry out a trust.

Ultra vires (Latin). Beyond the power. Applied to acts of corporations beyond the charter powers.

Unilateral. One-sided. Applied to contracts where only one promise is still unperformed.

Vendor. The seller. Usually applied to the seller of real property.

Venue. (1) Locality, place; (2) the heading of legal documents showing the state and county.

Verdict. The decision of a jury upon matters submitted to it.

Vis major (Latin). Superior force. Includes more than an act of God, as the act of a public enemy.

Void. Null; of no effect. This is the correct meaning, but the term is sometimes used in the sense of "voidable."

Voidable. Capable of being rendered void, usually at the election of one party to a contract.

Waiver. The surrender of some right or privilege which the law gives.

Waste. The name given to any act of a tenant whereby the value of the reversion is diminished, as the cutting of trees.

Witness. (1) One who gives evidence in a court; (2) one who sees a document executed and signs his name to it as evidence thereof.

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